Supreme Court, U.S.
FILED
NOV 18 1991
OFFICE OF THE CLERK

No. 91-813

In The

Supreme Court of the United States

October Term, 1991

ARTHUR J. FARMER,

Petitioner,

vs.

RAY MABUS, Governor of the State of Mississippi,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DENNIS L. HORN*
SHIRLEY PAYNE
Post Office Box 1725
Jackson, Mississippi 39215-1725
(601) 373-0170

Counsel for Petitioner
*Counsel of Record

November 18, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Mississippi Adjutant General, Arthur J. Farmer, may obtain judicial review of the constitutional limitations placed over the authority of the Governor as Commander-in-Chief to assume direct operational control of the National Guard without removing the Adjutant General from his specific statutory and constitutional duties in a manner required by law.

2. Whether the Governor of Mississippi, as Commander-in-Chief of the Mississippi militia, may remove the Adjutant General from his specific state and federal statutory and constitutional duties, including those as executive head of the civilian Military Department, without due process of law.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 7

Reasons for Granting the Writ 12

I. The Fifth Circuit's Doctrine of Non Justiciability, Where Applied to the Constitutional Structure of the National Guard, Conflicts with Decisions of this Court and Other Circuits... 12

II. The Decision Below that the Usurpation of Absolute Military Authority by the Governor of the State of Mississippi is Non-Reviewable Raises Important and Unresolved Problems Concerning What Countervailing Checks and Balances Must be Asserted Against Such Authority 14

Conclusion 15

Appendix 1A

TABLE OF AUTHORITIES

Page

CASES:

Brown v. Glines, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) 13

Committee for GI Rights v. Callaway, 518 F.2d 466, 474 (D.C.Cir. 1975) 13

Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) 13

Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) 13

Harmon v. Brucker, 355 U.S. 579 (1958) 12

Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985) 13

Perpich v. Department of Defense, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990) 13, 14

Winters v. United States, 89 S.Ct. 57 (Douglas, Circuit Justice 1969) 14

OTHER AUTHORITIES:

Mississippi Constitution of 1890 Article 3, Section 14 6

Mississippi Constitution of 1890 Article 9, Section 216 5

Mississippi Constitution of 1890 Article 9, Section 219 6

Section 33-3-1, Mississippi Code Annotated of 1972 ..... 6, 10

Section 33-3-7, Mississippi Code Annotated of 1972 ..... 6, 9

Section 33-3-11, Mississippi Code Annotated of 1972 6

TABLE OF AUTHORITIES – Continued

Page

National Guard Regulations 4

United States Constitution Article I, Section VIII, Clauses 12, 13, 14, 15, 16, 18 ..... 2, 3

United States Constitution Article II, Section II, Clause 1 4

United States Constitution Article VI, Clause 2 3

United States Constitution Fourteenth Amendment 6

48 Stat. 153 (1933) 4

32 U.S.C. Section 110 (1916) 4

32 U.S.C. Section 314(a)(d) 4, 5

32 U.S.C. Section 709(c) 5

Exec. Order No. 11053, 3 C.F.R. 645-646 (1959-1963) 15

No. _____

In The

Supreme Court of the United States

October Term, 1991

ARTHUR J. FARMER,

Petitioner,

vs.

RAY MABUS, Governor of the State of Mississippi,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner Arthur J. Farmer, Adjutant General of the State of Mississippi, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on August 20, 1991.

OPINIONS BELOW

The opinion of the Court of appeals for the Fifth Circuit is reported at 940 F.2d 921 (5th Cir. 1991), and is reprinted in the appendix hereto, p. 56A, *infra.*

The Memorandum Opinion and Order of the United States District Court for the Southern District of Mississippi (Barbour, D.J.) is reported at 757 F.Supp 1462 (S.D.Miss. 1991). It is reprinted in the appendix hereto, p. 1A, *infra*.

JURISDICTION

Jurisdiction in this cause was invoked pursuant to 28 U.S.C. Sections 1331, 1343 (3) (4), 1361 and 2201. Petitioner brought this suit in the Southern District of Mississippi on May 1, 1990. On March 6, 1991, the Southern District granted Petitioner's Motion for Summary Judgment and issued its injunction and declaratory judgment. See p. 1A, *infra*.

On Respondent's appeal, the Fifth Circuit on August 20, 1991, entered a judgment and opinion vacating the judgment of the District Court and directing that Petitioner's complaint be dismissed, holding that this matter was not justiciable in a federal forum. See p. 56A, *infra*. No petition for rehearing was sought.

The jurisdiction of the Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section VIII, Clauses 12-14:

> To raise and support Armies, but no Appropriation of Money to the Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make rules for the Government and Regulation of the land and naval Forces.

United States Constitution, Article I, Section VIII, Clause 15:

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions; . . .

United States Constitution, Article I, Section VIII, Clause 16:

> To provide for organizing, arming, and disciplining, the Militia and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

United States Constitution, Article I, Section VIII, Clause 18:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

United States Constitution, Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be

made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

48 Stat. 153 (1933):

The National Guard of the United States is hereby established. It shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units, and organizations, and of the officers, warrant officers, and enlisted members of the National Guard of the several States, Territories, and the District of Columbia, who shall have been appointed, enlisted and appointed, or enlisted, as the case may be, in the National Guard of the United States. . . .

United States Constitution, Article II, Section II, Clause 1:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . .

32 U.S.C. § 110:

The President of the United States shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard. National Guard Regulations. (See Appendix, p. 68A).

32 U.S.C. § 314(a):

There shall be an adjutant general in each State and Territory, Puerto Rico, the Canal Zone, and the District of Columbia. He shall perform the

duties prescribed by the laws of that jurisdiction.

32 U.S.C. § 314(d):

The adjutant general of each State and Territory, Puerto Rico, the Canal Zone, and the District of Columbia, and officers of the National Guard, shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him. Each Secretary shall send with his annual report to Congress an abstract of the returns and reports of the adjutants general and such comments as he considers necessary for the information of Congress.

32 U.S.C. § 709(c):

The Secretary concerned shall designate the adjutants general referred to in section 314 of this title [32 USCS Section 314], to employ and administer the technicians authorized by this section.

Mississippi Constitution Article 9, Section 216:

All officers of militia, except non-commissioned officers, shall be appointed by the governor, by and with the consent of the senate, or elected, as the legislature may determine; and no commissioned officer shall be removed from office except by the senate on suggestion of the governor, stating the grounds on which such removal is recommended, or by the decision of a court-martial pursuant to law, or at his own request.

Mississippi Constitution, Article 9, Section 219:

The adjutant-general, and other staff officers to the commander-in-chief, shall be appointed by the governor, and their appointment shall expire with the governor's term of office, and the legislature shall provide by law a salary for the adjutant-general commensurate with the duties of said office.

Miss. Code Ann. Section 33-3-1:

The governor shall be commander in chief of the militia and each of the classes thereof, except when it is called into the service of the United States, and shall have power to call forth the militia to execute the laws, repel invasion, and to suppress riots and insurrections, and to perform such other functions as may be authorized by law.

Miss. Code Ann. Section 33-3-7:

The governor shall nominate and, by and with the consent of the senate, appoint and commission an adjutant general which appointment shall carry with it the rank of major general; . . .

Miss. Code Ann. Section 33-3-11:

As a matter of State law, the Adjutant General has, *inter alia*, fifteen specific powers and duties. (See Appendix, p. 71A).

Mississippi Constitution Article 3, Section 14:

No person shall be deprived of life, liberty or property except by due process of law.

United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Upon his assumption of the governorship of the State of Mississippi in 1988, Respondent Ray Mabus duly appointed, and the Mississippi Senate confirmed, Petitioner Arthur J. Farmer to serve as the Adjutant General of the National Guard for the State of Mississippi. It is undisputed that at the time of this confirmation, Governor Mabus assured General Farmer that he would be given free hand to command the Mississippi National Guard. The Governor said he wanted the General (1) to use the National Guard as an economic development tool, and (2) to implement a career officer development plan that would be based on merit and not longevity or politics. Subsequently, General Farmer was ordered to make certain appointments to fill open officer slots in the Mississippi National Guard, which appointments clearly were motivated by politics and not the individual merit of those proposed to be promoted. The General refused to comply.

In January of 1990, the news media in Mississippi published several stories concerning General Farmer's

purchase of a partial ownership interest in property adjacent to the North Gate of Camp Shelby, a National Guard training camp located in Forest County, Mississippi. According to the media accounts, a possible expansion of Camp Shelby was under consideration at the time that the land purchase by General Farmer and two other National Guard members was made. In fact, no expansion of Camp Shelby has been made, and no potential National Guard military decisions have, or would have, increased the value of the property. Following the publication of these news accounts, Governor Mabus issued a written reprimand to General Farmer concerning the purchase of the property and directed General Farmer immediately to divest himself of any interest in such property. Mabus additionally informed the General that a request had been forwarded to the Mississippi Ethics Commission for a thorough investigation of this matter. Following his receipt of Mabus' letter, General Farmer divested himself of his interest in the property.

On February 9, 1990, Mabus issued a written directive to General Farmer that stated: " . . . I have determined that it is both necessary and appropriate for me to exercise my responsibilities as Commander-in-Chief of the Military Department of the State of Mississippi by assuming direct control over the day-to-day operations of the Department. . . . Thus, I have assumed direct operational control of the Mississippi National Guard."

Thereafter, on March 5, 1990, Mabus ordered Farmer to delegate all of his authority with respect to his federal duties in the National Guard, which order General Farmer obeyed. Mabus then ordered Farmer to vacate his office located at the Military Department. In addition,

General Farmer was instructed to terminate all flight duties and to return the state automobile he had used in connection with National Guard activities. During this time Governor Mabus withdrew his recommendation that Adjutant General Farmer be promoted to the rank of Major General, as required under Section 33-3-7 of Miss. Code Ann. of 1972. General Farmer therefore lost his promotion and remained a Brigadier General in the United States National Guard and the Adjutant General of Mississippi.

On April 19, 1990, General Farmer issued the following statement:

> [I]t is obvious to me that because of the responsibilities incumbent upon me as Adjutant General, I should either reassert my authority or resign. Because of my love for the Mississippi National Guard and my respect for the Mississippi Senate, which confirmed me and invested me with the authority as Adjutant General, I have chosen to reassert my full authority and to perform all my duties as Adjutant General of the State of Mississippi.
>
> To allow someone else to perform my duties while I remain legally responsible for their actions under both State and Federal law jeopardizes both the integrity of Federal funding for the Mississippi National Guard and my position as Adjutant General.
>
> I am revoking any prior delegations of authority made by me, and I will perform the duties and obligations imposed upon me by State and Federal law. Not to reassert my authority as Adjutant General would be in dereliction of these duties.

On that date, General Farmer attempted to return to his office in the Military Department. However, the General was ordered to vacate the premises by Lieutenant Governor Brad Dye, acting on behalf of Governor Mabus who was out of the state at that time. When Farmer refused to vacate the building, he was escorted from the premises by members of the Mississippi Highway Patrol, and left in the street.

Orders issued by the Adjutant General requiring the appointment of a legal advisor for himself and giving direct orders to Brigadier General Brackeen to cease operating as the officer in charge of the Mississippi National Guard, personally accountable to Governor Mabus for daily operations, were ignored.

On May 1, 1990, General Farmer filed the instant action. Shortly thereafter, the Governor brought charges against the General in a pretrial court martial proceeding pursuant to Mississippi Code of Military Justice, Section 33-3-1, *et seq.*, Miss. Code Ann. (1972 as amended). The General was formally suspended with pay from his position as Adjutant General. Following a formal investigation, the Governor then ordered that a court martial be convened.

The military judge dismissed the charges against the General on the grounds of undue command influence exercised by Governor Mabus, finding that:

1. The court martial was initiated because of the accused's, General Farmer's, asserting his constitutional rights through this federal lawsuit. The military judge found that the Governor wanted to be rid of the General, not seek military discipline over him;

2. Potential Court members (*i.e.*, jurors for the court martial) presented by the convening authority, (*i.e.*, those agents acting on behalf of Governor Mabus,) systematically excluded qualified personnel;

3. The Governor did not personally select the Court members as required, but these Court members were selected, improperly, by members of the Governor's political staff; and,

4. Selection of Court Member General Bela Chain by the convening authority (the Governor's office) with knowledge on the part of the convening authority that the accused and General Chain had had serious differences relating to the removal of General Chain from a major command position by the accused (General Farmer), and an order by the convening authority to the accused to reinstate General Chain to the command position because of political reasons indicated to the Court a lack of impartiality.

This finding of command influence is relevant on the facts of political motivation alleged. General Farmer's Motion to Dismiss the court martial therefore was granted on Thursday, November 1, 1990. That ruling by the military judge was appealed to the Mississippi Court of Military Appeals, although General Farmer contended that the dismissal was non-appealable, based on Rule 6 of the Practice and Procedure of the Mississippi Court of Military Appeals, "The accused shall be the appellant in all cases." The Mississippi Court of Military Appeals ultimately agreed and dismissed the court martial.

Disregarding decisions of the Military Court Martial, the Governor refused to return the Adjutant General to

his duties. The Governor's position has been and remains adamantly that regardless of the decisions of the Military Court he, the Governor, would not return General Farmer to his duties. Neither has the Governor issued his statutorily required recommendation that General Farmer be promoted to Major General, a decision which will have continuing collateral consequences for General Farmer beyond the end of his term of office.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Doctrine of Non-Justiciability, Where Applied to the Constitutional Structure of the National Guard, Conflicts with Decisions of this Court and Other Circuits.

This case does not involve the type of objectionable judicial inquiry that attends consideration of traditional military, intraservice, personnel matters. General Farmer's action challenges whether an exercise of authority by the Governor could occur under the circumstances presented, not whether the actual decision made, (and made outside of any established intraservice mechanism,) was in fact a wise one. The question of a governor's authority as commander-in-chief is one of constitutional proportion and, as such, is properly cognizable before the federal courts. As the United States Supreme Court recognized in *Harmon v. Brucker*, 355 U.S. 579 (1958), the issue of whether a military official has exceeded his express or implied powers is judicially cognizable before a federal court. *Harmon*, 355 U.S. at 582. The Governor, by clothing himself in the mantle of Commander-in-Chief, has usurped the authority of the Adjutant General and

exceeded his express and implied powers as either a military or political officer. The General's challenge is not to military regulations nor is it tied to discrete personnel matters directed against him. The General is not attacking a decision internal to the chain of command, but attacking the exercise of unlawful military authority asserted outside the chain of command.

The non-justiciability decision of the Fifth Circuit is counter to this Court's recent opinion in *Perpich v. Department of Defense*, ___ U.S. ___, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990) and is contrary to other decisions entered in this Court and numerous other circuits.[1]

Purely legal issues, particularly those that involve constitutional limitations on military authority and the manner in which that authority can be exercised, fall within the expertise of the federal courts and are issues which the court is competent to address. As has been noted with regard to Article III courts and their responsibility to protect the constitutional rights of all citizens,

---

[1] *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) (Jewish officer's free exercise-based challenge to Air Force regulation prohibiting wearing headgear indoors rejected); *Brown v. Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (reaching merits of and rejecting attack against Air Force regulation requiring prior approval for soliciting petition signatures); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (overturning sex-based discriminatory administration of quarters allowance for servicemembers' dependents); *Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985) (upholding injunction against free speech-abridging off-limits regulation) and *see, Committee for GI Rights v. Callaway*, 518 F.2d 466, 474 n. 20 (D.C.Cir. 1975).

> It is the function of the Courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. . . . A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our public law.

Winters v. United States, 89 S.Ct. 57, 59-60 (Douglas, Circuit Justice 1969).

II. The Decision Below That the Usurpation of Absolute Military Authority by the Governor of the State of Mississippi is Non-Reviewable Raises Important and Unresolved Problems Concerning What Countervailing Checks and Balances Must be Asserted Against Such Authority.

This Court has stated that a question related to the interplay of power between the state and federal authority over the National Guard is one of "manifest importance." *Perpich, supra*, 110 S.Ct. at 2422. Governor Perpich had countermanded federal military authority on only one order, the order to send troops out of the country to Central America. Here, Governor Mabus has named himself Adjutant General under the unallayed exercise of power as Commander-in-Chief. He has usurped authority over all orders governing the National Guard, although, by the force of law, certain duties are constrained to the exercise of the Adjutant General, without oversight or control from the office of the Governor.[2] One may wonder

---

[2] The Judgment of the District Court enumerates the exclusive powers of the Adjutant General with exactitude. (Appendix, pp. 53A-55A)

if a similar assertion of authority would have been acknowledged by President Kennedy when he ordered the National Guard to supersede the orders of another Mississippi Governor, Ross Barnett, at the time James Meredith integrated the University of Mississippi under federal military protection. Exec. Order No. 11053, 3 C.F.R. 645-646 (1959-1963).

CONCLUSION

For these reasons this Court should grant Certiorari.

Respectfully submitted,

DENNIS L. HORN
SHIRLEY PAYNE
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215
(601) 373-0170

Arthur J. FARMER, Plaintiff,

v.

Ray MABUS, as Governor of the State of Mississippi, Defendant.

No. J90-0206(B).

United States District Court,
S.D. Mississippi,
Jackson Division.

March 6, 1991

Dennis L. Horn, Shirley Payne, Horn and Payne, Jackson, Miss., for Plaintiff.

Stephen J. Kirchmayr, Office of Atty. Gen., Jackson, Miss., for defendant.

MEMORANDUM OPINION AND ORDER

BARBOUR, Chief Judge.

This cause is before the Court, pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure, on the Motion of Defendant, Governor Ray Mabus, for Summary Judgment, or in the Alternative, to Dismiss for failure to state a claim upon which relief can be granted. Plaintiff, Arthur J. Farmer, has filed a Cross-Motion for Summary Judgment. Both parties have responded to the Motions. In addition to the responses and memoranda of authorities submitted in connection with the instant Motions, the Court has also considered evidence submitted at previous hearings in this matter as well as stipulations that have been entered in the record of this case. Both parties have agreed that the case should be decided on the Cross-Motions for Summary Judgment without

further evidentiary hearings. On that basis, the Court now renders the following findings of fact and conclusions of law.

I. FACTS AND PROCEDURAL HISTORY

Upon his assumption of the governorship of the State of Mississippi in 1988, Defendant Ray Mabus duly appointed, and the Mississippi Senate confirmed, Plaintiff Arthur J. Farmer to serve as the adjutant general of the National Guard for the State of Mississippi. As adjutant general, Farmer was designated the executive head of the state military department and was subordinate only to the governor, as commander in chief, in matters pertaining thereto. The adjutant general is vested with certain duties and authority relating to the National Guard pursuant to both state and federal law.

In January of 1990, the news media in Mississippi published several stories concerning Farmer's purchase of a partial ownership interest in property adjacent to the north gate of Camp Shelby, a National Guard training camp that is located in Forrest County, Mississippi. According to the media accounts, a possible expansion of Camp Shelby was under consideration at the time that the land purchase by Farmer and two other National Guard members was made. Following the publication of these news accounts, Mabus issued a written reprimand to Farmer concerning the purchase of the property and directed Farmer to immediately divest himself of any interest in such property. Mabus additionally informed Farmer that a request had been forwarded to the Mississippi Ethics Commission to thoroughly investigate this

matter. Following his receipt of Mabus' letter, Farmer divested himself of his interest in the property.

On February 9, 1990, Mabus issued a written directive to Farmer that stated:

> In light of recent developments, I have determined that it is both necessary and appropriate for me to exercise my responsibilities as Commander-in-Chief of the Military Department of the State of Mississippi by assuming direct control over the day-to-day operations of the Department. To that end, I have today directed Brigadier General Denver Brackeen to assume an added duty as my Special Advisor for Military Affairs. As such, General Brackeen will be responsible for advising me with respect to all aspects of the functioning of the Military Department of the State of Mississippi. Thus, I have assumed direct operational control of the Mississippi National Guard. My advisor and representative is General Brackeen.
>
> I am hereby directing you, on a daily basis, to coordinate all aspects of your current duties as Adjutant General through my office, including but not limited to those responsibilities of the Adjutant General set out in section 33-3-11, Mississippi Code of 1972. I also hereby direct you to submit a report to my office each Thursday afternoon, setting out your proposed activities as Adjutant General for the following week. However, you are not to undertake any of those activities until you receive written approval from me. In addition, each Monday morning you are to submit a report to my office, accounting for the previous week. These reports are in

> addition to the day-to-day coordination with my office referenced above.

On February 12, 1990, Lieutenant General John B. Conaway, Chief of the National Guard Bureau, an auxiliary of the Departments of the Army and the Air Force that is directed to oversee compliance with federal National Guard regulations, issued a memorandum concerning the Mississippi National Guard, wherein he stated:

> Enclosed is a letter from Governor Ray Mabus of Mississippi indicating that he intends to assume direct operational control over the Military Department of the State of Mississippi, and that his advisor and representative in that regard will be Brigadier General Denver Brackeen. This has been accomplished.
>
> Governor Mabus has asked that the National Guard Bureau work directly with his office on National Guard matters. This action is within the authority of the Governor, as Commander-in-Chief of the Mississippi National Guard.

Thereafter, on March 5, 1990, Mabus ordered Farmer to delegate to General Brackeen "all of your authority under 32 USC 708 with respect to technician matters and authority to sign documents concerning such matters. . . . In addition, I order you to designate Brigadier General Brackeen as your representative to provide the briefing required by [certain National Guard regulations]." The governor conferred with the National Guard Bureau prior to issuing this order, and the National Guard Bureau not only approved of this action, but also forwarded to the governor suggested drafts for the order. By letter dated March 13, 1990, Farmer complied with Mabus' order and delegated all of the requested duties to General Brackeen.

Farmer specifically provided in his letter of delegation that "[t]his delegation of authority shall remain effective until specifically revoked in writing by me."[1] Following this exchange of letters, Mabus then ordered Farmer to vacate his office located at the Military Department and report for work at the Mississippi Emergency Management Agency, which was located in a separate state office building. In addition, Farmer was instructed to terminate all flight duties and to return the state automobile he had used in connection with National Guard activities.

On April 19, 1990, Farmer attempted to reassert his authority as adjutant general over the Mississippi National Guard. On that date, Farmer issued the following statement:

> This is to inform all concerned that on 19 April 1990, I, Major General Arthur J. Farmer, am reasserting my authority as The Adjutant General, Mississippi National Guard. . . . Based on [the advice of independent legal counsel], it is obvious to me that because of the responsibilities incumbent upon me as Adjutant General, I should either reassert my authority or

---

[1] In the original March 13, 1990, letter that Farmer sent in response to Mabus' orders to delegate certain of his duties, Farmer delegated his duties pursuant to 32 U.S.C. § 709. However, Mabus' order had called for the delegation of duties Farmer held pursuant to 32 U.S.C. § 708. On April 6, 1990, Farmer revoked the original delegation of duties that had been made in the March 13, 1990, letter and issued a new delegation of duties to General Brackeen that correctly delegated the duties held under 32 U.S.C. § 708. Farmer again provided in the April 6, 1990, letter that the delegation of authority would remain in effect until specifically revoked in writing.

> resign. Because of my love for the Mississippi National Guard and my respect for the Mississippi Senate, which confirmed me and invested me with the authority as Adjutant General, I have chosen to reassert my full authority and to perform all my duties as Adjutant General of the State of Mississippi.
>
> To allow someone else to perform my duties while I remain legally responsible for those actions under both State and Federal law jeopardizes both the integrity of Federal funding for the Mississippi National Guard and my position as Adjutant General.
>
> I am revoking any prior delegations of authority made by me, and I will perform the duties and obligations imposed upon me by State and Federal law. Not to reassert my authority as Adjutant General would be in dereliction of these duties.

On that date Farmer also attempted to move his office back to the Military Department. However, Farmer was ordered to vacate the premises by Lieutenant Governor Brad Dye, acting on behalf of Mabus who was out of the state at that time. When Farmer refused to vacate the building, he was escorted from the premises by members of the Mississippi Highway Patrol. It is asserted that subsequent to the events of April 16, 1990, Farmer gave direct orders to Brigadier General Brackeen to cease operating as the officer in charge of the Mississippi National Guard and that General Brackeen refused to obey the direct orders of Farmer.

On May 1, 1990, Farmer filed the instant lawsuit. In his complaint, Farmer asserts that Mabus has stripped

him of his authority as adjutant general to direct the day-to-day operations of the Mississippi National Guard. Such acts, Farmer contends, are tantamount to his removal from office. Since Mabus has failed to remove the adjutant general from office in the manner pre ribed by Mississippi law, Farmer asserts that he has been deprived of the property interest he holds in his position as adjutant general of the Mississippi National Guard without due process of law as guaranteed by the Mississippi Constitution and the fourteenth amendment to the United States Constitution. Further, Farmer contends that Mabus' orders directing him to delegate certain of his duties as adjutant general are in violation of both state and federal statutes and regulations that require those duties to be carried out by the duly appointed adjutant general of the Mississippi National Guard. In the complaint, Farmer asks this Court to issue a declaratory judgment that the adjutant general, until he is removed from office in a manner prescribed by law, possesses the authority and duty under applicable federal and state law to oversee the day-to-day operations and all specific operations of the Mississippi National Guard. Farmer further prays for the issuance by the Court of an injunction directing Mabus not to impede Farmer's performance of his duties. Shortly after the filing of the complaint, Farmer filed a Motion for Preliminary Injunction seeking to have this Court enjoin Mabus' interference with Farmer's supervision of the Mississippi National Guard. Mabus responded to the Motion for Preliminary Injunction and also filed a Cross-Motion for Summary Judgment, or in the Alternative, to Dismiss.

Subsequent to the filing of this lawsuit, "charges and specifications" were lodged against Farmer pursuant to provisions of the Mississippi Code of Military Justice that provide for the institution of court martial proceedings against members of the Mississippi National Guard. On June 15, 1990, Farmer was formally suspended with pay from his position as adjutant general. On that same date, Mabus filed a Motion to Hold in Abeyance, seeking to have this Court suspend any action in the instant lawsuit pending resolution of the military proceedings that had been instituted against Farmer. Both Mabus' Motion to Hold in Abeyance and Farmer's Motion for Preliminary Injunction were denied by this Court. Thereafter, Farmer filed a Motion for Summary Judgment.

The military investigation of the charges and specifications that had been lodged against Farmer concluded that a court martial proceeding was justified on the charge that Farmer had created a conflict of interest by participating in the land purchase. On the basis of the findings of the military investigation, Mabus thereafter ordered Farmer to stand trial by a court martial for his involvement in the land deal.

Once court martial proceedings had been instigated against Farmer, he filed with this Court a Motion to Enjoin the Court Martial Proceeding. By Order of this Court entered October 31, 1990, Farmer's Motion to Enjoin the Court Martial Proceedings was denied. Shortly thereafter, the court martial proceeding was dismissed by the presiding military judge on the basis that Mabus had exerted improper command influence over the instigation of the court martial proceeding. In its findings, the military court concluded that there was sufficient evidence to

indicate that the court martial proceeding had been instituted in reaction to Farmer's filing of the instant case in federal court. Prosecutors in the court martial proceeding subsequently appealed the findings of the military court to the Mississippi Court of Military Appeals. While that appeal is pending, Farmer remains on suspension with pay from his position as adjutant general.

II. CONCLUSIONS OF LAW

Rule 56 of the Federal Rules of Civil Procedure states in relevant part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Moreover, the party moving for summary judgment bears the responsibility of informing the district court of the basis for its motion, and identifying those portions of the record in the case which it believes demonstrates the absence of a genuine issue of fact. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552-53.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is improper merely where the court believes it unlikely that the opposing party will prevail at trial. *National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir.1962).

Five primary issues of law are presented by the Motions for Summary Judgment presently before the Court:

(1) whether Farmer's claims present legal issues that are justiciable before this court;

(2) whether Farmer has standing to raise the claims that he has asserted;

(3) whether Farmer has a property interest in his position as adjutant general that is protected by the due process clause of the fourteenth amendment to the United States Constitution and the due process clause of the Mississippi Constitution, so that delegation of Farmer's authority as adjutant general without the observation of certain procedural protections constitutes a deprivation of due process of law;

(4) whether Mabus has divested Farmer of his authority as adjutant general that is derived from certain state statutes so that the failure to remove Farmer from

office in compliance with Mississippi law constitutes a violation of state law; and

(5) whether Mabus has divested Farmer of his federally derived authority as adjutant general in violation of the United States Constitution as well as certain federal statutes and regulations.

Both parties agree, and the Court so finds, that no genuine issues of material fact exist as to any of the claims asserted in Plaintiff's complaint and that all issues of law can be determined by the Court on the summary judgment motions presently under consideration without further evidentiary hearings.

A. Structure of the National Guard

Before addressing the particular legal issues raised by this matter, the Court feels that a brief explanation of the operational structure of the Mississippi National Guard is instructive.

A state militia is expressly provided for the United States Constitution. *See* U.S. Const. amend. II. Thus, each state is empowered to maintain and, indeed, does maintain a state militia, the modern counterpart which we know as the National Guard ("State Guard").

In 1933, Congress provided for the merging of state militia and federal military forces by making the State Guard a permanent part of the federal military system. Under the "dual-enlistment" concept, State Guard organizations were made reserve components of the United States Army and Air Force. In their federal capacities these State Guard units are the National Guard of the

United States. The 1933 Act created an enlistment system whereby "an incoming guardsman joined both the National Guard of his home state and the National Guard of the United States." *Johnson v. Powell*, 414 F.2d 1060, 1063 (5th Cir.1969). Thus, every Guardsman serves as both a reservist in the federal military and a militiaman is the state military. *Dukakis v. United States Dept. of Defense*, 686 F.Supp. 30, 34 (D.C.Mass.), *aff'd* 859 F.2d 1066 (1st Cir.1988) (quoting Weiner, *The Militia Clause of the Constitution*, 54 Harv.L.Rev. 181 208 (1940)).

Because of the National Guard's uniquely dualistic role within our system of federal government, it has its constitutional roots not only in the right of states to raise and maintain a militia, but also in Congress' authority to raise and support armies, *see* U.S. Const. art I, § 8, cl.16, and the President's power to oversee federal military forces as commander in chief. *See* U.S. Const. art. II, § 2. Pursuant to its constitutional authority, Congress has enacted legislation for equipping, training, and disciplining National Guard units. Congress has also created the National Guard Bureau, an auxiliary of the Department of the Army and Air Force, to oversee National Guard units and to ensure compliance with federal statutes and regulations. 10 U.S.C. § 3040. National Guard units that fail to comply with federal standards are subject to forfeiture of federal funds and other benefits. 32 U.S.C. § 108.

Federal regulation of National Guard units requires each state to have an adjutant general who "shall perform the duties prescribed by the laws of that jurisdiction." 32 U.S.C. § 314(a). Federal law also specifies certain federal duties that must be performed by the adjutant general in addition to those duties imposed upon him under state

law. *See* 32 U.S.C. § 314(c) (requiring adjutant general to make reports and returns to Secretaries of the Army and Air Force); 32 U.S.C. § 709(c) (authorizing adjutant general to employ and administer technicians); 32 U.S.C. § 322(c) (requiring adjutant general to administer and discharge enlisted men in the National Guard); 32 U.S.C. § 324(b) (requiring adjutant general to supervise National Guard officers as prescribed by state law). Additional federal duties of the adjutant general are set forth by United States National Guard Regulations and cover at least thirty-nine areas of supervision and oversight.[2]

State law also defines the role that the adjutant general is to play in directing the National Guard. By provision of the Mississippi Constitution, the governor serves as the commander in chief of the state militia, the Mississippi National Guard. Miss. Const. art. 9, § 217. The

---

[2] For examples of United States National Guard Regulations ("NGR") that specifically set out the duties and authority of the adjutant general *see* NGR 10-1 (federal recognition of Army National Guard Units); NGR 10-2 (STARC headquarters responsibilities); NGR 11-27 (Army National Guard Energy Program); NGR 58-1 (administration/operation of administrative use vehicles); NGR 95-1, MARNG Supplement 1 (aviation); NGK 130-6 (appointment of United States Property and Fiscal Officers); NGR 190-11 (physical security); NGR 230-65 (unit funds); NGR 310-10 (orders); NGR 335-10 (control of reports); NGR 351-3 (NCO education system); NGR 351-5 (authorization for Mississippi Military Academy); NGR 385-5 (accident prevention); NGR 385-10 (safety and health); NGR 385-11 (radiation safety); NGR 600-2 (premobilization screening of ARNG personnel); NGR 600-5 (active guard/reserve program); NGR 600-6 (selection, training, and assignment of FTRF); NGR 600-7 (managing active army personnel); NGR 600-12 (army national guard family program).

Mississippi law also provides that the governor is to appoint an adjutant general, Miss. Const. art. 9, § 219, who "shall be the executive head of the [military] department [of the State of Mississippi] and, as such, subordinate only to the governor in matters pertaining thereto." Miss.Code Ann. § 33-3-3 (1972). The governor's appointment of an adjutant general must be confirmed by the Mississippi Senate. Miss. Const. art. 9, § 216; *see* also Miss.Code Ann. § 33-3-7 (1972). The adjutant general's term of appointment is co-extensive with the governor's term of office, Miss. Const. art. 9, § 219, and he may be removed from office only upon his own request, by a decision of a court martial proceeding, or upon the recommendation of the governor and a vote of two-thirds of the Mississippi Senate. Miss. Const., art. 9, § 216.

As a matter of state law, the adjutant general has certain specified powers and duties. Pursuant to these statutory provisions, the adjutant general must appoint all employees of the Mississippi Military Department; keep and maintain all records, papers, and reports required of the military department by both state and federal regulations; issue commissions to military officers; and attend and issue all military property. Miss.Code Ann. § 33-3-1 (1972). Among other powers, the adjutant general is also authorized to issue, with the approval of the governor, such orders, rules, and regulations as may be necessary for the proper training and discipline of National Guard Forces. Miss.Code Ann. § 33-3-15 (1972).

B. Analysis of Claims

Plaintiff asserts that he holds a property interest in his position as adjutant general of the Mississippi National Guard and in the authority that the position confers upon him pursuant to state and federal law. Plaintiff contends that Defendant has effectively removed him from his position as adjutant general without the observation of the specific legal procedures which state law requires to remove the adjutant general from office, and that, accordingly, he had been deprived of his property interest in his position and command authority as adjutant general without due process of law as guaranteed by the Mississippi Constitution and the fourteenth amendment to the United States Constitution. Plaintiff further alleges that, because he has been improperly deprived of his authority as adjutant general, Defendant is in violation of state and federal statutes and regulations that require the duly appointed adjutant general to exercise certain powers with regard to the National Guard. Defendant contests the claims asserted by Plaintiff and also raises justiciability and standing as bars to Plaintiff's suit.

(1) Justiciability

A primary argument advanced by defendant in this matter is that this lawsuit concerns a military personnel matter and, as such, should not be heard by this Court on the basis of justiciability concerns. In addition, Defendant asserts that the state law claims asserted by Plaintiff are barred by the Eleventh amendment to the United States Constitution and principles of state sovereignty.

(a) deference to military decision-making

The primary concern in determining the justiciability of claims asserted by servicemen against the military and their commanding officers has historically been the degree to which judicial action would interfere with military functions. As the United States Supreme Court recognized in *Orloff v. Willoughby*, 345 U.S. 83, 93-94, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

In *Chappell v. Wallace*, 462 U.S. 296, 305, 103 S.Ct. 2362, 2368, 76 L.Ed.2d 586 (1983), the Court reiterated its position that judicial action must not proceed at the expense of military authority and discipline.

> The special relationships that define military life have supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that Courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.

It is this view of the proper spheres of judicial and military decision-making that has tempered judicial consideration of the justiciability of various types of claims lodged against the military. In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Court determined that personal injury claims asserted by servicemen in which monetary damages were sought did not present justiciable issues where the injury arose from or in the course of activities that were incident to military service. *Ferres*, 340 U.S. at 146, 71 S.Ct. at 159. Likewise in *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), the Court held that military personnel could not maintain suits for alleged constitutional violations by superior officers where a monetary recovery was sought. *Chappell*, 462 U.S. at 305, 103 S.Ct. at 2368. Both the *Feres* and *Chappell* courts cited interference with the military function and the availability of alternative intraservice remedies as bases for denying judicial action in these circumstances. *See Chappell*, 462 U.S. at 299-300, 103 S.Ct. at 2365-66; *Feres*, 340 U.S. at 144, 71 S.Ct. at 158.

The central justiciability issue presented by the instant case, that is the availability of judicial review where injunctive relief, as opposed to monetary damages, is sought for alleged constitutional violations, was addressed by the court in *Crawford v. Texas Army National*

Guard, 794 F.2d 1034 (5th Cir.1986). While noting that neither *Feres* nor *Chappell* directly addressed the issue of injunctive relief, the *Crawford* court recognized that those decision indicated that "[t]here can be little doubt that the permissible range of lawsuits by present and former servicemen against their superior officers is, at the very least, narrowly circumscribed." *Crawford*, 794 F.2d at 1035. The court then concluded that the justiciability of lawsuits involving military matters was not dependent upon the nature of relief sought, but rather upon the nature of the lawsuit itself. *Id.* at 1036. Where the claims asserted in a lawsuit were such that resolution of the suit would invite judicial second-guessing of military actions and would tend to overlap remedial structures that already existed within the military structure itself, the judicial deference exhibited in *Feres* and of *Chappell* should prevail. *Id.* On this basis, the *Crawford* court concluded that lawsuits involving military matters were proper subjects of judicial action only where "they involve challenges to the facial validity of military regulations and [are] not tied to discrete personnel matters." *Id.*

Defendant asserts that this Court must dismiss Plaintiff's suit because it involves military personnel issues that are non-justiciable under the holding of *Crawford*. This lawsuit, Defendant contends, clearly challenges a military personnel matter i.e., the orders given by the governor as commander in chief to the adjutant general. Defendant contends that, because this lawsuit would require the Court to directly consider the application of certain military regulations to a specific personnel decision, this Court must refrain from considering Plaintiff's

claims. Conversely, Plaintiff contends that the instant suit is not barred by the *Crawford* decision. Because this suit seeks judicial review of the constitutional limitations placed upon the authority of a commander in chief to assume direct operational control of the National Guard without removing the adjutant general from office as required by law, and because this suit only requires the Court to consider whether relevant constitutional principles support Defendant's contention that he has legal authority to act in the manner that he has, Plaintiff contends that this Court is not *Crawford* bound to dismiss the action as non-justiciable because the Court will not be required in any way to consider the actual merits of any discretionary personnel decision Defendant made while acting on the presumption that he had the authority to undertake the actions in dispute.

Upon examination of *Crawford* as well as other relevant legal authority, the Court concludes that the instant suit presents issues of law that are fully justiciable in this forum. While this Court is fully aware of the clear directive on the justiciability of military matters that has been laid down in *Crawford*, the Court concludes that, unlike the issues presented in that decision, the instant case does not present issues that are capable of being broken down neatly into the categories of challenges to the facial validity of military regulations and challenges to personnel matters. Upon examination of the reasoning expressed in *Crawford* to distinguish these two types of actions, however, this Court finds that the instant case does not involve the type of objectionable judicial inquiry that attends consideration of traditional military personnel matters. As the Court has previously noted, Plaintiff's

suit challenges whether an exercise of authority by Defendant could occur under the circumstances presented, not whether the actual decision that was made while exercising that authority was in fact a wise one. The question of Defendant's authority in this matter is one of constitutional proportion, and as such, is properly before this Court. As the United States Supreme Court recognized in *Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958), the issue of whether a military official has exceeded his express or implied powers is judicially cognizable before a federal court. *Harmon*, 355 U.S. at 582, 78 S.Ct. at 435. Accordingly, the Court finds that the claims asserted by Plaintiff are predominately constitutional in nature and, as such, do not present discrete personnel matters which should not be heard by this Court.

Upon further review of the record in this case, the Court finds additional evidence to support its conclusion that the instant matter does not present the type of military personnel matter for which judicial review has traditionally been considered objectionable. As this Court notes, *infra*, Defendant has been able to cite no provision of state law which expressly grants him the authority to assume direct control of a personnel matter as he has purportedly done in the instant matter. Nor has Defendant been able to provide this Court with any statutory authorization for the particular personnel decision that was made in this instance. Without some legal basis for Defendant's exercise of personnel decision-making authority in this case, the Court is hard pressed to conclude that Defendant's actions can be in fact characterized as personnel matters. Indeed, the record is replete

with circumstances that indicate that political considerations, rather than personnel concerns, have been the motivating factor in Defendant's conduct. This Court is unwilling to fashion a rule of law which would allow political maneuvering that affects constitutional concerns to go unanswered in court merely because such activity has been termed a personnel matter by those guilty of such conduct. Accordingly, the Court finds that Plaintiff's suit is not barred by justiciability concerns on that basis.

The Court is persuaded of the justiciability of this matter upon consideration of other factors cited in the *Crawford* decision as well. *Crawford* and its predecessors have consistently cited the availability of intraservice remedies that ultimately provide for judicial review at later stages in the process, as a basis for denying judicial intervention in such matters. The facts of the instant case, however, do not support a finding that Plaintiff would have any effective intraservice remedy available to him if the Court refuses to hear this lawsuit. Though Defendant has not cited this Court to any intraservice remedy that Plaintiff should have resorted to as an alternative to this action, the Court concludes that the Mississippi Code of Military Justice does provide intramilitary grievance procedures that could have been utilized by Plaintiff.

> Any member of the state military forces who believes himself wronged by his commanding officer and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall examine into the complaint and take proper measures for redressing the wrong complained of.

Miss. Code Ann. § 33-13-605 (1972). The Court notes that Plaintiff has not availed himself of this statutory remedy. However, the Court does not conclude that the mere availability of an unexhausted intraservice remedy requires the Court to dismiss Plaintiff's suit. Rather, the Court concludes that the availability of an intraservice remedy may have no effect on the justiciability of Plaintiff's claim where it can be demonstrated that resort to that remedy would have been futile or where no real possibility of adequate relief exists by means of unexhausted remedy. *See Committee for GI Rights v. Callaway,* 518 F.2d 466, 474 n. 20 (D.C.Cir.1975); *Hodges v. Callaway,* 499 F.2d 417, 420-21 (5th Cir.1974). On this basis, the Court concludes that Plaintiff's failure to exhaust the intraservice remedy provided by Miss.Code Ann. § 33-13-605 is not fatal to his federal suit since resort to that procedure, in light of the record in this case, would produce no real possibility of adequate relief for Plaintiff's grievances. The procedure provided for by section 33-13-605 would require Plaintiff to apply to his commanding officer, Defendant in this instance, for redress of his grievances. If redress of Plaintiff's claims was refused, Plaintiff would then be required to make a further complaint "to any superior officer" who, under the peculiar facts of this case, could only be Defendant. Because the process could only result in Plaintiff applying to Defendant for a redress of his grievances, and because the record of this case clearly demonstrates that Defendant would not give impartial consideration to a challenge to his authority by Plaintiff, the Court concludes that Plaintiff's suit is justiciable despite Plaintiff's failure to

exhaust the intraservice remedies that were available to him.

Lastly, the Court notes a final factor that has often been cited as a basis for rejecting judicial intervention in military matters, namely that such matters involve considerations that are particularly within military as opposed to judicial, expertise. The Court finds that no such concerns are present in the instant matter. Plaintiff's claims do not require the Court to review in any way the substantive wisdom of any particular military judgment that Defendant has made. Rather, this Court only concerns itself with constitutional limitations that may be placed on Defendant's ability to assume operational control of the National Guard in the particular manner he has chosen. Purely legal issues, particularly those that involve constitutional limitations on military authority and the manner in which that authority can be exercised, fall within the "expertise" of this Court and are ones which this Court is competent to address. Accordingly, the Court concludes that Plaintiff's claims should not be dismissed as non-justiciable. As has been noted with regard to Article III courts and their responsibility to protect the constitutional rights of all citizens,

> It is the function of the Courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. . . . A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our public law.

Winters v. United States, 89 S.Ct. 57, 59-60, 21 L.Ed.2d 80 (Douglas, Circuit Justice 1969).

(b) sovereign immunity

In addition to claims of non-justiciability on the basis of military deference, Defendant also asserts that this court should decline to hear all state law claims raised in this lawsuit on the basis of the eleventh amendment to the United States Constitution and principles of sovereign immunity.

The eleventh amendment to the United States Constitution provides that

> [t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. In *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the Court held that, despite the express language of the eleventh amendment itself, federal courts were barred by that provision from considering a suit brought by a citizen against his own state.

Defendant asserts that, concomitant with the eleventh amendment, principles of sovereign immunity, and the decision in *Pennhurst State School & Hospital v. Halderman (Pennhurst II)*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), this Court is barred from considering Plaintiff's state law claims. In *Pennhurst II*, the Court considered whether a federal suit alleging that state officials have violated state law in carrying out their official duties was barred by the eleventh amendment. The Court held that,

where the alleged violation of law which is to be remedied is strictly a violation of state law and no federal statutes or constitutional provisions have been implicated, a federal suit against state officials is barred by the eleventh amendment and principles of sovereign immunity. *Pennhurst II*, 465 U.S. at 117, 104 S.Ct. at 917. Consequently, this Court concludes that, to the extent that Plaintiff seeks redress purely on the basis of a violation of state law by Defendant, Plaintiff's claims are barred by the eleventh amendment and this Court cannot issue any relief, injunctive or otherwise, with regard to those claims of the complaint.

The Court notes, however, that this finding does not bar Plaintiff's suit completely, nor does it remove all issues of state law from this lawsuit. In addition to his claim that Defendant has violated state law, Plaintiff also asserts that he has been deprived of a property interest in his authority as adjutant general in violation of the due process clause of the fourteenth amendment to the United States Constitution. This Court initially notes that, with regard to the property interest of which Plaintiff has allegedly been deprived, state law can serve to define whether such a property interest does exist and, if so, the substance of any property interest so found. *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (holding that a property right is established by showing that a "legitimate claim to entitlement" exists under state law). The Court therefore concludes that, to the extent that resort to state law is necessary to define the alleged property interest at issue in this lawsuit, state law remains a vital part of this Court's decision and does not when restricted to this consideration alone,

fall within the confines of the *Pennhurst II* decision. Consequently, the eleventh amendment does not bar resolution of the due process claims asserted by Plaintiff.

The Court next considers whether the eleventh amendment bars the due process claim on the basis that it represents a suit against a state official. The Court notes that a suit challenging the constitutionality of a state official's actions is not a suit against the State within the meaning of the eleventh amendment and, therefore, is not barred by sovereign immunity. *Ex parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 454, 52 L.Ed. 714 (1908). This result obtains with regard to all challenges to the constitutionality of official conduct, regardless of whether the constitutionality of the state statute under which the state official purported to act is challenged itself. *Greene v. Louisville & I.R. Co.*, 244 U.S. 499, 507, 37 S.Ct. 673, 677, 61 L.Ed. 1280 (1917).

The Court is cognizant of the anomaly that the *Young* exception to sovereign immunity appears to create when it is applied to suits such as the instant matter where a violation of due process is asserted. In essence, *Young* stands for the proposition that an official's allegedly unconstitutional conduct does not constitute state action for purposes of the sovereign immunity issue, but does constitute state action for purposes of asserting a fourteenth amendment claim. *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685, 102 S.Ct. 3304, 3314-15, 73 L.Ed.2d 1057 (1982). However, this result is necessary to ensure that federal courts maintain their ability to vindicate federal rights and require state officials to conform their conduct to "the supreme authority

of the United States." *Young*, 209 U.S. at 160, 28 S.Ct. at 454.

According, this Court concludes that the eleventh amendment and principles of sovereign immunity do no bar consideration of Plaintiff's due process claims. This result is proper even though state law must be consulted in determining whether a property interest does in fact exist and despite the fact that the conduct of a state official is at issue.

(2) Standing

Defendant next asserts that Plaintiff lacks standing to assert claims based upon an alleged violation by Defendant of certain federal statutes and regulations pertaining to the authority and duties of the adjutant general. In support of this contention, Defendant notes that Plaintiff, in his present status as a member of the Mississippi National Guard, cannot be court martialed under the United States Uniform Code of Military Justice and can only be discharged from his duties "as provided by the laws of the State [of Mississippi]." *See* 32 U.S.C. § 324(b). In addition, Defendant notes that the only action that federal authorities could take in the event that federal requirements concerning the operation of the Mississippi National Guard are violated would be to bar, in whole or in part, all federal funds and benefits received by the Mississippi National Guard. *See* 32 U.S.C. § 108. On that basis, Defendant contends that Plaintiff is not able to establish any personal injury-in-fact that he has sustained as a result of Defendant's orders prohibiting him to

undertake or carry out certain federal statutory or regulatory duties. Since the only entity that could be injured by failing to follow the federal requirements would be the Mississippi National Guard, Defendant asserts that Plaintiff has failed to establish standing to raise claims based on those federal statutes and regulations.

As the United States Supreme Court has recently reiterated, standing "as perhaps the most important of the jurisdictional doctrines," thus placing federal courts under a special obligation to determine that standing exists in all controversies placed before them. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 607, 107 L.Ed.2d 603 (1990) (citing *Allen v. Wright*, 468, U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984)). In order to establish standing to raise a claim, a plaintiff must demonstrate that (l) he has personally suffered or will suffer some distinct injury-in-fact as a result of defendant's putatively illegal conduct; (2) the injury can be traced with some degree of causal certainty to defendant's conduct; (3) the injury is likely to be redressed by the requested relief; (4) the plaintiff must assert his own legal rights and interests, not those of a third party; (5) the injury must consist of more than a generalized grievance that is shared by many; and (6) the plaintiff's complaint must fall within the zone of interests to be regulated or protected by the rule of law in question. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-77, 102 S.Ct. 752, 757-61, 70 L.Ed.2d 700 (1982); *see also Allen v. Wright*, 468 U.S. 737, 751-52, 104 S.Ct. 3315, 3324-25, 82 L.Ed.2d 556 (1984). Moreover, where injunctive relief is sought, a plaintiff must establish that [sic] he personally

faces a realistic, immediate, and non-speculative thread of being prospectively subjected to or harmed by the particular conduct at issue. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102,103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983). Mere proof of injury that is a result of past conduct is not sufficient. *Lyons*, 461 U.S. at 102, 103 S.Ct. at 1665.

The Court finds that Plaintiff has demonstrated standing to challenge the alleged violation of federal statutes and regulations pertaining to the office of adjutant general. Defendant's argument that Plaintiff has no standing to raise these claims is largely premised upon the fact that the only punitive damage that could be taken by federal authorities upon a violation of federal law would be against the Mississippi National Guard and not against Plaintiff himself. Upon examination of relevant legal authority, however, the Court rejects this argument on two bases.

The ability of federal authorities to withdraw federal funds from the Mississippi National Guard for violations of federal law does not constitute an absolute bar to Plaintiff's standing to challenge those same violations of federal law. As the United States Supreme Court has observed, a withdrawal of federal funds is a severe and often clumsy remedy to address isolated incidents of noncompliance with federal statutes. *Cf., Cannon v. University of Chicago*, 441 U.S. 677, 703-04, 99 S.Ct. 1946, 1961, 60 L.Ed.2d 560 (1979). Since federal law imposes no restrictions on federal funding of the National Guard, and funding decisions may be made with total discretion, *see MacFarlane v. Grasso*, 696 F.2d 217, 226 (2nd Cir.1982), this Court is persuaded that provisions allowing for the cut-

off of federal funds were not intended to serve as the sole method of redressing violations of federal statutes regulating National Guard activities. As the Court in *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 428, 107 S.Ct. 766, 773, 93 L.Ed.2d 781 (1987) noted, a federal agency's discretionary powers to curtail federal funding are insufficient to indicate the foreclosure of all other remedies for violations of applicable federal statutes and regulations. Accordingly, this Court finds that provisions allowing for the curtailment of federal funds to the Mississippi National Guard which could be used in the event of violations of federal requirements do not constitute an absolute bar to other remedies for violation of those same federal requirements and cannot support a conclusion that standing should be denied to Plaintiff on this basis.

The Court also finds Defendant's contention that Plaintiff has no standing to assert federal statutory and regulatory claims because federal authorities could take no direct punitive action against Plaintiff to be without merit. Because Plaintiff could not be court-martialed or otherwise removed from office pursuant to federal law, Defendant contends that Plaintiff has suffered no injury-in-fact as a result of the alleged violations of federal law. This Court notes, however, that the alleged violations of federal law, if established, would clearly result in damage to Plaintiff's position of command as well as his personal honor in carrying out those command duties. The standing of a military officer to raise damage to his honor as a cognizable injury has long been recognized. *See, e.g., Case of Davis*, 7 F.Cas. 63, 97 (C.C.D. Va. 1867). The United States Supreme Court has recently restated its position

that non-financial interests in one's employment can confer standing to challenge conduct that impeded those non-financial career interests. *See Rutan v. Republican party of Illinois*, ___ U.S. ___, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). As the *Rutan* court noted, constitutional protection exists for public employees to such an extent that they have been found to have standing to challenge "act[s] of retaliation as trivial as failing to hold a birthday party for a public employee. *Rutan*, 110 S.Ct. at 2737 n. 8. Consequently, there are injuries to career interest less harsh than dismissal that nevertheless grant standing to challenge injurious conduct. *Id.* 110 S.Ct. at 2737. The Court therefore concludes that the lack of federal authority to directly cause Plaintiff's dismissal or to otherwise reprimand him does not prohibit Plaintiff from asserting standing to challenge alleged violations of federal statutes and regulations where Plaintiff has clearly established that such violations, if proved, directly resulted in injury to his honor, his position of command, and his ability to exercise his authority as adjutant general.

(3) Due Process Claims

Having determined that neither principles of justiciability nor standing prohibit this Court from addressing Plaintiff's claims that Defendant has deprived him of a protected property interest in violation of the due process clause and other relevant federal statutes and regulations, the Court now considers the merits of Plaintiff's substantive claims.

(a) property right

In order to establish that Defendant has acted in contravention to the due process clause of the fourteenth amendment to the United States Constitution, Plaintiff must first establish some property right or interest that falls within the protection of that constitutional provision. In order to establish a property right, Plaintiff must demonstrate that, pursuant to state law, he had a "legitimate claim of entitlement" to the position of adjutant general. *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

Article 9, section 216 of the Mississippi Constitution provides that the adjutant general can be removed from office "by the Senate on suggestion of the Governor, stating the grounds on which the removal is recommended, or by a decision of court-martial pursuant to law, or at his own request." This Court finds that Article 9, section 216 of the Mississippi Constitution creates a "legitimate claim of entitlement" on behalf of Plaintiff to continue in the position of adjutant general until his removal from office is achieved in one of the ways authorized by state law.

It is undisputed that Plaintiff has been suspended with pay from the performance of all duties associated with the office of adjutant general. Defendant, however, contends that this suspension has not resulted in a violation of either substantive or procedural due process as guaranteed to Plaintiff. Because the position of adjutant general does not encompass a right to act independent of the direction, orders, and general command authority of the governor as commander in chief, Defendant contends

that Plaintiff has in fact suffered no loss of authority that he has a right to legitimately claim as an attribute of the office of adjutant general. Defendant additionally asserts that, assuming Plaintiff has suffered some deprivation of a property interest, the procedures that have been instituted to suspend Plaintiff from his position with pay conform to the procedural requirements of the due process clause.

The Court will initially consider the nature of the property interest that Plaintiff holds in his position as adjutant general. As noted by the Court in *Board of Regents v. Roth, supra,* property interests "are created and their dimensions are defined by existing rules or regulations that stem from . . . state law." *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709. In this regard the Court notes that Mississippi law provides that

> [t]here shall be in the executive branch of the state government a military department. The adjutant general shall be the executive head of the department and, as such, subordinate only to the governor in matters pertaining thereto.

Miss.Code Ann. § 33-3-3 (1972). Mississippi law also provides certain general powers and duties the adjutant general is to exercise. *See, e.g.,* Miss.Code Ann. § 33-1-33(2) (authorizing adjutant general to confer peace officer powers upon military personnel); *id.* § 33-3-11 (authorizing adjutant general to appoint employees, maintain military records, issue commissions, and attend military property); *id.* § 33-7-23 (authorizing adjutant general to order inspections); § 33-7-111 (authorizing adjutant general to dismiss or transfer officers); *id* § 33-7-113 (authorizing adjutant general to publish a list

of officers). Mississippi law expressly provides, however, that some of the authority conferred upon the adjutant general may be exercised only with the approval of the governor. For example, Miss.Code Ann. § 33-3-11 (15) (1972) states that the adjutant general shall, with the approval of the governor, provide for the organization, training, tactical employment, and discipline of the Mississippi National Guard. In addition, Miss.Code Ann. § 33-3-15 (1972) provides that the adjutant general shall have the power, with the approval of the governor, to issue such orders, rules and regulations relating to the organization of the Mississippi National Guard as may be necessary to ensure that training and discipline programs are in compliance with federal requirements.

Defendant asserts that Plaintiff's property interest in his position as adjutant general is defined not only by state law dealing with the powers and authority of the adjutant general, but also state law dealing with the powers that the governor may exercise as commander in chief and as Plaintiff's superior officer. Mississippi law provides that

> [t]he governor shall be commander in chief of the militia . . . except when it is called into the service of the United States, and shall have the power to call forth the militia to execute the laws, repel invasion, and to suppress riots and insurrections, and *to perform such other functions as may be authorized by law.*

Miss. Code Ann. § 33-3-1 (1972) (emphasis added). Mississippi law expressly authorizes the governor, as commander in chief, to exercise certain powers over the state

militia.[3] As previously noted, however, state law expressly provides for gubernatorial oversight, review, or approval of the adjutant's general's actions with regard to only certain, specific statutory enactments. *See, e.g.*, Miss.Code Ann. §§ 33-3-11(15) and 33-3-15 (1972) (authorizing adjutant general, with the approval of the governor, to promulgate orders, rules, and regulations concerning with the organization, training, and discipline of the Mississippi National Guard).

This Court concludes that the substance of the property right held by Plaintiff in his position and authority as adjutant general is defined by three distinct categories of statutory enactments. The first category involves those statutes that expressly provide for the adjutant general to exercise certain duties and authority without any mention of oversight or review of these actions by the commander in chief. With regard to this category of statutory empowerment, Plaintiff has established a property interest in the absolute right to exercise such authority without interference from the commander in chief. The second category of statutory enactments includes those statutory provisions that expressly provide for gubernatorial oversight of the adjutant general's activities. With regard to

---

[3] The various actions the governor is authorized to take with regard to the state militia included ordering an enrollment of the state militia (Miss.Code Ann. § 33-5-3), appointing a Board of Exemptions (*id.* § 33-5-7), drafting and ordering into service an unorganized state militia (*id.* § 33-5-9 through -13), organizing and equipping a state guard force (*id.* § 33-5-51 through -53), ordering troops beyond the borders of the state (*id.* § 33-7-7), appointing and commissioning all officers of the Mississippi National Guard (*id.* § 33-7-101), and ordering the state militia into active duty pursuant to a declaration of martial law (*Id.* § 33-7-301 through -303).

this category of statutory empowerment, Plaintiff has established a property interest in the right to exercise these powers and authority only to the extent that Plaintiff has demonstrated an entitlement to undertake these activities subject to the direction and supervision of the commander in chief. Finally, the third category of statutory enactments include those statutory provisions that expressly provide for the commander in chief to exercise certain duties and authority without any mention of participation by the adjutant general. With regard to this category of statutory enactments, Plaintiff has demonstrated no property interest in the right to exercise or participate in the exercise of these powers and authority.

Defendant asserts that Plaintiff's property interest in his powers and authority as adjutant general is not only constrained by the express provisions of statutory enactments, but also by an implied constraint on all exercises of the adjutant general's authority that is inherently present by virtue of Defendant's superior authority as commander in chief. Clearly, Defendant contends, both the statutes concerning the authority of the adjutant general and those dealing with the authority of the commander in chief contemplate that the adjutant general is merely the executive head of the Mississippi National Guard and in all matters pertaining thereto is subordinate to his commander in chief. Defendant asserts that the statutes concerning the duties of the adjutant general clearly contemplate that all activities of the adjutant general are subject to the approval of the governor. Thus, according to Defendant, the adjutant general has at no time had a legitimate claim of absolute entitlement to perform any of

his duties without the supervision and approval of the commander in chief of the Mississippi National Guard.

This Court, however, is unable to conclude that Defendant's powers as commander in chief are of such a limitless nature that they inherently deprive Plaintiff of his right to assert a property interest in the authority he has been vested with as adjutant general. Defendant's theory of implied limitations on Plaintiff's authority is necessarily premised on the notion that the inherent powers of the commander in chief to direct and control the operations of the National Guard are without limit under state law. This Court, however, finds that limits do exist and are, indeed, expressly provided for in the same statutory enactments that are the source of the commander in chief's powers. Miss.Code Ann. § 33-3-1 (1972) expressly provides that the governor, as commander in chief, shall have the power "to call forth the militia, to execute the laws, repel invasion, and suppress riots and insurrections, and to perform other such functions as may be authorized by law" This Court concludes that, contrary to Defendant's assertions, Mississippi law specifically provides that all powers of the commander in chief must be expressly provided for by law. Section 33-3-1, by its plain language, clearly rebuts the suggestion that the position of commander in chief is one of implied powers. The Court further notes that section 33-3-1 clearly expresses the legislative mandate that the position of commander in chief is not one of inherent authority, but rather one of express granted powers. The Mississippi legislature, by virtue of its statutory enactments, has clearly established that certain powers are to be exercised by the commander in chief and certain powers are to be

exercised by the adjutant general. Any theory of implied powers would be contrary to the statutory scheme that the legislative representatives of that state have enacted.

This Court finds support for its conclusion that Defendant does not have the inherent power as commander in chief to remove Plaintiff's authority as adjutant general in cases from other jurisdictions that have considered attempts to remove the adjutant general from office. In *McDonald v. Schnipke*, 380 Mich. 14, 155 N.W.2d 169 (Mich.1968), the court entertained a quo warranto proceeding to determine Plaintiff's right to hold the office of state adjutant general where he had been appointed, summarily removed, reinstated, and immediately suspended from acting in that capacity. Plaintiff argued that, because state law provided a specific procedure by which he could be removed from office as adjutant general and that procedure had not been followed, the attempt to remove him from office or otherwise deny him the authority of that position was void. In holding that Plaintiff did have a right to hold his duly appointed office until he had been removed from office in accordance with state law, the court specifically rejected the contention that the governor, as commander-in-chief, had the inherent authority to remove military officers from office. *McDonald*, 155 N.W.2d at 172. Noting that, under state law and state constitutional provisions, the governor was granted the express power as commander in chief to call out the armed forces of the state, the court concluded that it could not read into that express grant of authority any implied authority of the commander in chief to remove or otherwise discipline officers of the militia. *Id.* Likewise, in *State ex rel. Pearson v. Hansen*, 401 P.2d 954 (Wyo.1965), the

court concluded that a governor had improperly removed a state adjutant general from office where the attempted removal was undertaken pursuant to the governor's general powers as commander in chief rather than the specific statutory provisions dealing with the removal of an adjutant general from office. *Pearson*, 401 P.2d at 960.

Having determined that no implied powers of the commander in chief exist which could serve as authority for Defendant's conduct in this matter, the Court now considers whether, as required by section 33-3-1, Defendant has been "authorized by state law" to assume the duties of the adjutant general and direct the daily operations of the Mississippi National Guard. This Court can find no such authorization. To the contrary, this Court notes Miss.Code Ann. § 33-7-5 (1972), which provides

> The commander in chief of the organized militia of this state may cause those officers under his command to perform any military duty, and they shall be responsible to the governor for the general efficiency of the organized militia and for the inspection, training, training, instruction, military proficiency, and care of the troops.

By its express terms, section 33-7-5 provides that the commander in chief may order his subordinate officers to perform any military duty, yet the subordinate officer himself is responsible to the commander in chief to ensure that the duty has been performed. This construction of state law simply does not support Defendant's contention that, as commander in chief, he has the legal authority to directly assume the performance of those duties himself.

The Court also finds instructive other statutes dealing with the scope of command authority that the commander in chief may wield when his powers to declare martial law have been exercised. Miss Code Ann. § 33-7-305 (1972) provides:

> It shall be the duty of the governor, when ordering out any portion of the national guard, for active state duty, to issue his orders to the officer in command of such troops as he may have ordered out, directing him as to the duty to be performed and the kind and extent of force to be used in the performance of such duty. . . . The tactical direction of the troops, the kind and extent of the force to be used, and the particular means to be employed are left solely with the military officers, subject to the orders received from the commander in chief.

Because section 33-7-305 expressly deals with the declaration of martial law and the powers of the commander in chief under such circumstances, the Court finds that it has no direct application to the facts of the instant case, since Defendant has never purported to act pursuant to a declaration of martial law. The Court does find, however, that the policies embodied by section 33-7-305 are instructive. Even when the governor is acting pursuant to a declaration of martial law, the scope of orders that he may direct to his subordinate officers is limited, and the commander in chief is not given the authority to directly intervene in matters of military tactics and operations. More importantly, however, the governor is specifically required to act through his subordinate officers and may not assume direct operational control of the Mississippi National Guard. If the

governor, acting pursuant to the most authoritative powers he has under a declaration of martial law, cannot assume direct operational control of the Mississippi National Guard the Court must conclude that the governor cannot assume direct operational control of the Mississippi National Guard under less crucial circumstances.

Finally, this Court notes that the limited nature of the governor's authority to direct the day-to-day affairs of the national guard is further strengthened by the fact that the State of Mississippi has insulated the adjutant general from such interference by allowing his removal from office, not by act of the governor, but only through the impeachment process before the state senate.

Based upon the foregoing analysis, this Court concludes that Plaintiff has a "legitimate claim of entitlement" to his position as adjutant general of the Mississippi National Guard and, therefore, has established a protected property right within the meaning the fourteenth amendment due process clause. The Court further finds that the substantive content of that property right, as defined by state law, includes those absolute powers and authority which state law has exclusively granted to the adjutant general and which the adjutant general is empowered to exercise without the supervision or interference of the commander in chief. Further, the Court finds that Plaintiff has established a property right in those powers and duties which state law grants to the adjutant general, but for which gubernatorial oversight of the adjutant general's activities are provided. With regard to these powers and duties, the Court concludes that Plaintiff's property right extends only to his right to

undertake these activities subject to the approval of the commander in chief.

(b) deprivation of a property right

Having determined the extent of Plaintiff's constitutionally protected property right in his authority as adjutant general, the Court must now consider whether Plaintiff has been deprived of his property right without the procedural due process protections to which he is entitled. Defendant initially asserts that Plaintiff has not been deprived of his property rights in violation of the due process clause because there has been no actual removal of Plaintiff from the office of adjutant general. Because Plaintiff still retains his office of command and has, in Defendant's terms, merely been "subordinated" to the authority of his commander in chief, Defendant asserts that no actual deprivation of Plaintiff's command has occurred. The Court finds this argument spurious, at best. Though Plaintiff may not technically be deprived of his command, in that he retains the title of adjutant general, the Court notes that Plaintiff has been effectively deprived of the ability to perform any single action in his capacity as adjutant general. The distinction that Defendant attempts to draw between deprivation of the title of adjutant general and deprivation of the ability to act as the adjutant general seems slim indeed when viewed in this light. The Court has previously concluded that certain of the duties and powers conferred upon the adjutant general are conferred upon him exclusively and are not subject to oversight or review by the commander in chief. Plaintiff is currently prohibited from exercising those exclusive powers. Accordingly, the Court concluded that

Plaintiff has in fact suffered a deprivation of rights which he is entitled to exercise.

As this Court has noted, Plaintiff is currently suspended from his position as adjutant general with pay. Defendant cites the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), for the proposition that an employer may, consistent with the requirements of fourteenth amendment due process, suspend with pay any employee who would be deemed to create a "significant hazard" if allowed to continue in active employment while pretermination procedures were under way. This Court finds, however, that Defendant's reliance on *Loudermill* is misplaced. While the *Loudermill* Court did note that suspension with pay might be an appropriate procedural protection in some instances, the Court specifically found that it was not applicable under the facts of that case. *Loudermill*, 470 U.S. at 544-45 n. 10, 105 S.Ct. at 1495 n. 10. Likewise, this Court finds that the facts of the instant case do not suggest a "significant hazard" of such proportions that Plaintiff's due process rights could be satisfied by suspending him with pay in lieu of his rights to pretermination process. In addition to the "significant hazard" exception relied upon by Defendant, this Court notes that *Loudermill* strongly reaffirmed the basic principles of due process protections that require appropriate procedural safeguards to be utilized before the deprivation of a protected interest can occur.

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action

> should not be taken is a fundamental due process requirement. . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 546, 105 S.Ct. at 1495 (citations omitted). Accordingly, the Courts conclude that suspension with pay does not constitute an appropriate procedural protection in this case.

Defendant next asserts that appropriate procedural protections have been observed in this matter because in addition to the provisions of Article 9, section 216 of the Mississippi Constitution dealing with the removal of the adjutant general from office, state law also provides for the suspension of any general military officer. Defendant, however, has not informed this Court of any state statute or other legal enactment that serves as the basis of this assertion. Contrary to Defendant's assertions, however, this Court notes that the Mississippi Code of Military Justice prohibits an individual who is the subject of a court-martial proceeding from being punished prior to the termination of that proceeding.

> No person, while being held for trial [by a court-martial proceeding] or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, . . . nor can the arrest or confinement imposed upon him be any more rigorous than the circumstances require to ensure his presence.

Miss.Code Ann. § 33-13-27 (1972). The Court therefore finds that suspension of Plaintiff pending the resolution

of the court martial proceeding is not lawful under this provision of the Military Code. The Court also finds that, to the extent Defendant's suspension of Plaintiff can be viewed as nonjudicial punishment by a commanding officer, Miss.Code Ann. § 33-13-31 (1972) specifically provides that suspension from duty by order of the governor cannot exceed sixty days. Consequently, the Court finds that Plaintiff's suspension is without merit under state law on the basis of this provision as well.

In summary, this Court concludes that Plaintiff has established that he holds a property interest in his position and authority as adjutant general that is protected under the due process clause of the fourteenth amendment. This Court further finds that Defendant has deprived Plaintiff of that property interest without the procedural protections to which Plaintiff is constitutionally entitled. Accordingly, the Court concludes that Defendant has violated Plaintiff's due process rights as guaranteed by the fourteenth amendment to the United States Constitution.

(4) Federal Statutory and Regulatory Claims

The Court now considers Plaintiff's remaining substantive claim, namely that Defendant has deprived Plaintiff of his federally derived authority as adjutant general in violation of certain federal statutory and regulatory provisions as well as the fourteenth amendment to the United States Constitution.

The Court initially addresses Defendant's contention that deference should be given to certain pronouncements by the National Guard Bureau that indicate that

the Bureau did not consider Defendant's actions to be in violation of any federal statute or regulation pertaining to the National Guard. Specifically, Defendant notes the February 12, 1990, letter by the Chief of the National Guard Bureau indicating that Defendant's order that Plaintiff clear all of his proposed actions as adjutant general before undertaking to act "[w]as within the authority of the Governor, as Commander-in-Chief, of the Mississippi National Guard." In addition, Defendant notes that the March 5, 1990, order to Plaintiff directing him to delegate certain of his federal duties and powers was undertaken pursuant to proposed draft orders that had been forwarded by the National Guard Bureau to Defendant. Because these occurrences indicate that the federal bureau charged with the responsibility of overseeing compliance with federal regulations did not view Defendant's actions as unlawful, Defendant asserts that this Court should defer to that agency's interpretation of its own regulations and laws.

It is true that a federal agency may enjoy deference from the court with regard to that agency's actions in administering the program it is entrusted to conduct. *See, e.g., Richardson v. Wright*, 405 U.S. 208, 209, 92 S.Ct. 788, 789, 31 L.Ed.2d 151 (1972). The Court, however, does not find this to be the critical inquiry in the instant matter. Both communications of the National Guard Bureau at issue are implicitly premised upon the Bureau's determination that Defendant was acting within the authority that had been conferred upon him pursuant to state law as commander in chief. A federal agency's determination of state law does not fall within the scope of judicial deference that Defendant urges. Accordingly, this Court

concludes that no particular deference should be accorded to the National Guard Bureau's opinion that Defendant was acting within his powers as commander in chief.

The Court also concludes that judicial deference is not warranted under these circumstances because the ultimate issues presented by this matter are of constitutional dimension. The opinions expressed by the National Guard Bureau, while facially dealing with issues of compliance with federal regulations, ultimately involve questions of who had the legal right to exercise the authority conferred upon the adjutant general. That issue is the basis of Plaintiff's due process challenge in this case. Where a dispute concerns constitutional issues, the court should interpret the constitutional provisions without yielding to an administrative interpretation. *Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837-38, 25 L.Ed.2d 192 (1970). Accordingly, the Court concludes that no particular deference should be accorded National Guard Bureau opinions on this basis as well.

As this Court has previously noted, federal statutes specify certain federal duties that are to be carried out by the duly appointed adjutant general of each state. *See, infra*, section I. The adjutant general is given additional federal duties pursuant to federal regulation of the National Guard. *See, infra*, note 2. Plaintiff contends that, because these duties are specifically directed to the adjutant general and he has not been removed from that position by a legal exercise of authority, he remains authorized and, indeed, compelled to perform those duties. This Court agrees. As the Court has already determined, Plaintiff has established a right to exercise all

duties and authority bestowed upon the adjutant general until such time as he is removed from office pursuant to the requirements of state law and fourteenth amendment due process. This Court has additionally determined that, until the time that such a removal is accomplished, Plaintiff has the prerogative to exercise all those rights and authority conferred upon him by state law that constitute Plaintiff's protected property interest. This Court can discern no basis for denying Plaintiff the same rights with regard to the duties that have been conferred upon him by federal law. *See Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970) (noting that due process protection may attach to benefits statutorily created under federal law). Accordingly, the Court concludes that, to the extent that federal statutes and regulations confer upon Plaintiff certain authority and duties pursuant to his position as state adjutant general and Plaintiff has not been legally removed from that position of authority, fourteenth amendment due process protections attach to all such federally created property interests. Consequently, Defendant has violated Plaintiff's due process rights by prohibiting Plaintiff from exercising his federally conferred authority while he still legally remains the state adjutant general.

III. CONCLUSION

Having concluded that Defendant violated Plaintiff's due process rights as guaranteed by the fourteenth amendment to the United States Constitution when Defendant stripped Plaintiff of his authority as adjutant general of the Mississippi National Guard without securing Plaintiff's removal from that office in compliance

with the requirements of state law, the Court finds that no genuine issue of material fact exists as to this count of Plaintiff's complaint and that summary judgment should be granted in favor of Plaintiff as a matter of law. The Court further finds that no genuine issue of material fact exists as to that count of Plaintiff's complaint alleging that Defendant has deprived Plaintiff of his federally derived authority as adjutant general in violation of federal statutory and regulatory provisions. Therefore, the Court finds that, as a matter of law, summary judgment should be granted in favor of Plaintiff on that count of the complaint as well. Based on the findings noted above, this Court determines that injunctive relief should be ordered in favor of Plaintiff and that Defendant should be enjoined from impeding, interfering with, or otherwise disrupting Plaintiff's performance of those duties, powers, and authority of the adjutant general in which Plaintiff has demonstrated a property interest. Specifically, this Court finds that, with regard to those specific statutory and regulatory enactments which exclusively vest in the adjutant general the absolute authority to undertake certain powers, duties or authority, Defendant should be enjoined from impeding, interfering with, or otherwise disrupting in any way Plaintiff's performance of such activities. Additionally, the Court finds that, to the extent that plaintiff has established a property right in certain duties, powers, and authority which he may exercise only with the approval or supervision of Defendant, Defendant is enjoined from prohibiting Plaintiff's performance of such activities, but Defendant may still exercise the full range of discretion and supervision with regard to Plaintiff's discharge of those activities. Finally, the

Court concludes that the injunctive relief issued in this case shall remain in force and effect until such time as Plaintiff is removed from the office of adjutant general as provided under Mississippi law or his term of office otherwise expires. Since these rulings are declaratory in nature, Plaintiff's request for a declaratory judgment is granted in addition to injunctive relief.

The Court notes that its ruling does not imply that Plaintiff is not required to obey the lawfully issued orders of his commander in chief. In addition, the Court notes that today's ruling does not consider, or in any way condone, Plaintiff's activity that is the underlying dispute in this matter.

Finally, the Court notes that it considers the entire matter presented by this lawsuit to be a disservice to the Mississippi National Guard, a military organization with a proud heritage of preparedness and ready service in the defense of this state and our nation. International events that have developed since the instjtution of this lawsuit and the important role that the Mississippi National Guard has played in those events underscore to this Court the importance and necessity of removing petty personal grievances and political dog fighting from the command structure of that organization. This incident has served not only as an embarrassment to the State of Mississippi and the Mississippi National Guard, but has shown command indifference to the dignity with which guardsmen serve their state and nation. Had General Farmer had the true interests of the military and the men under his command in mind, this Court concludes that he would have taken a path different from the one chosen. While Governor Mabus may feel in hindsight that he

exercised poor judgment in appointing Farmer to the office of adjutant general, he exercised even worse judgment in the way that he has chosen to handle this matter. If General Farmer has not satisfactorily performed his duties, the governor should have lawfully sought Farmers' court-martial or impeachment. Such has not been the case. This Court can only hope that today's ruling will emphasize to all parties involved in this lawsuit the degree of competence and professionalism that the public rightfully expects, and guardsmen rightfully deserve, in the command of the Mississippi National Guard.

IT IS THEREFORE ORDERED that Defendant is hereby enjoined from impeding, interfering with, or otherwise disrupting Plaintiff's performance of all absolute duties, authority, and powers conferred by state or federal law upon him as the adjutant general of the Mississippi National Guard.

IT IS FURTHER ORDERED that Defendant is hereby enjoined form [sic] prohibiting Plaintiff's performance of certain duties, powers, and authority which Plaintiff is authorized to perform with Defendant's supervision and oversight, provided, however, that Defendant may still exercise the full range of discretion and supervision with regard to Plaintiff's discharge of these activities.

IT IS FURTHER ORDERED that the injunction hereby ordered of Defendant's conduct shall become effective immediately and shall remain in force and effect until such time as Plaintiff is removed from the office of adjutant general as provided under the laws of Mississippi or otherwise no longer occupies that office.

IT IS FURTHER ORDERED that, pursuant to the Court's decision in this Memorandum Opinion and Order, a separate Declaratory Judgment and Order for Injunctive Relief will be entered in this case to guide the parties in carrying out this Court's Order.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ARTHUR J. FARMER — PLAINTIFF

VS. — CIVIL ACTION NO. J90-0206(B)

RAY MABUS, AS GOVERNOR
OF THE STATE OF MISSISSIPPI — DEFENDANT

DECLARATORY JUDGMENT AND ORDER FOR INJUNCTIVE RELIEF

(Filed March 6, 1991)

Pursuant to the Memorandum Opinion and Order entered this day in the above styled cause, this Court now enters a separate Declaratory Judgment and Order for Injunctive Relief to guide the parties in carrying out the Court's Order.

IT IS THEREFORE ORDERED that Plaintiff is granted a declaratory judgment adjudging the substantive conclusions of law as set forth in the Court's Memorandum Opinion and Order.

IT IS FURTHER ORDERED that Defendant is hereby enjoined from impeding, interfering with, or otherwise disrupting Plaintiff's performance of any absolute duty, power, or authority that has been conferred upon him as adjutant general by any state or federal statute or regulation. Accordingly, Defendant is prohibited from impeding, interfering with, or otherwise disrupting Plaintiff's performance of duties, powers, or authority that have been conferred upon him pursuant to, among other provisions, Miss. Code Ann. § 33-1-27(b); § 33-1-33(2);

§ 33-1-35; § 33-3-11; § 33-5-51; § 33-7-23; § 33-7-107; § 33-7-111(d), (f); § 33-7-113; § 33-7-311; § 33-7-405; § 33-7-411; § 33-7-413; § 33-9-7; § 33-9-11; § 33-11-1; § 33-11-3; § 33-11-5; § 33-11-7; § 33-1-9; § 33-11-11; § 33-11-13; § 33-11-17; § 33-11-18; § 33-13-11; § 33-13-15; § 33-13-17 § 33-13-177; § 33-13-183; § 33-13-417; and § 33-13-625. The Court does not consider this list exhaustive, but rather illustrative of the type of statute or regulation which confers upon the adjutant general an absolute right to undertake certain activity and does not expressly provide for any oversight or supervision of such activity by the commander in chief. Accordingly, Defendant is enjoined from any interference with such duties, powers, or authority.

IT IS FURTHER ORDERED that Defendant is hereby enjoined from prohibiting *in toto* Plaintiff's performance of certain duties, powers, and authority which Plaintiff is authorized by state or federal statute or regulation to perform with the Defendant's oversight and supervision, provided, however, that Defendant may still exercise his full range of discretion in supervising Plaintiff's discharge of these activities. Accordingly, Defendant may supervise Plaintiff's discharge of powers, authority, and duties as provided by Miss. Code Ann. § 33-3-9; § 33-3-11(15); § 33-3-15; § 33-9-3; § 33-9-13; § 33-1-15; and § 33-11-19. Again, the Court does not consider this list to be exhaustive, but rather illustrative of the type of statute or regulation which confers upon the adjutant general the authority to carry out certain activities, but only upon the direction or supervision of the commander in chief.

IT IS FURTHER ORDERED that the injunction hereby ordered of Defendant's conduct is effective immediately

and shall remain in force and effect until such time as Plaintiff is removed from the office of adjutant general as provided under the laws of the State of Mississippi or otherwise no longer occupies that office.

SO ORDERED this the 6th day of March, 1991.

/s/ William H. Barbour, Jr.
CHIEF JUDGE

Arthur J. FARMER, Plaintiff-Appellee,

v.

Ray MABUS, as Governor of the State of Mississippi,Defendant-Appellant.

No. 91-1274.

United States Court of Appeals,
Fifth Circuit.

Aug. 20, 1991.

Stephen J. Kirchmayr, Jr., Robert E. Sanders, Asst. Attys. Gen. and Mike Moore, Atty. Gen., Jackson, Miss., for defendant-appellant.

Shirley Payne and Dennis L. Horn, Horn & Payne, Jackson, Miss., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before REYNALDO G. GARZA, POLITZ, and JONES, Circuit Judges.

POLITZ, Circuit Judge:

Ray Mabus, the governor of Mississippi, appeals an adverse grant of declaratory and injunctive relief in favor of Major General Arthur J. Farmer,[1] the Adjutant General of the Mississippi National Guard, enjoining the governor from continuing to deny General Farmer the exercise of executive authority over the state National Guard. Concluding that the issue is not justiciable in a federal forum

---

[1] General Farmer is state-recognized as a major general; he is federally-recognized as a brigadier general.

and that the matter was thus improvidently considered by the district court, we vacate its judgment and dismiss the complaint.

Background

In January of 1990, Governor Mabus became aware through local press reports that General Farmer had purchased interests in land adjacent to the National Guard training center at Camp Shelby, Mississippi, during a time when expansion of Camp Shelby was under consideration. As Commander-in-Chief of the Mississippi National Guard,[2] the governor reprimanded the general, directed that he divest himself of the property, and referred the matter to the State Ethics Commission.

A few weeks later the governor took additional action, assuming "direct control over the day-to-day operations" of the state Military Department and appointing Brigadier General Charlie Denver Brackeen as his Special Advisor for Military Affairs. The governor ordered General Farmer to coordinate with General Brackeen on a daily basis respecting all aspects of his duties as adjutant general, and to make weekly reports on his duty-related plans for the next week. Lieutenant General John B. Conaway, who as Chief of the National Guard Bureau heads the joint entity of the Departments

---

[2] Miss.Code Ann. § 33-13-1. The Mississippi National Guard is composed of its headquarters staff and both the Mississippi Army National Guard and the Mississippi Air National Guard.

of the Army and the Air Force charged with administration of the National Guard system nationwide, wrote General Farmer advising that the Bureau was aware of the governor's actions and was working directly with him.

On March 5, 1990 the governor ordered General Farmer to delegate all of his "authority under 32 U.S.C. 708 with respect to technician matters and authority to sign documents concerning such 'FOR THE ADJUTANT GENERAL' to Brigadier General Charlie D. Brackeen. . . . " One week later, the governor directed the general to vacate his Military Department office and report for duty with the Emergency Management Agency, relieved him of all duties pursuant to Army Regulation 570-4,[3] forbade him from performing flight duties, and directed that he return the state vehicle and credit cards he had been issued as Adjutant General.

In a March 13 letter to General Brackeen, General Farmer "reluctantly" delegated all of his authority as per instructions from the governor. A typographical error was corrected in a subsequent letter dated April 6. General Farmer's letters both closed with a notation that "This delegation of authority shall remain in effect until specifically revoked in writing by me."

On April 18, 1990 General Farmer wrote a letter informing "all whom it may concern" that as of the following day he was "reasserting [his] authority as The Adjutant General, Mississippi National Guard." His six-paragraph letter stated that his 40 years in service to his state and country had trained him to obey the orders of

---

[3] This regulation is entitled "Manpower Management."

his superiors without hesitation, but that the research of "independent legal counsel" suggested that he "should either reassert [his] authority or resign." Contending that his love for the Guard and respect for the Mississippi Senate precluded the latter, he chose the former.

Explaining his legal theory, the general's letter continued;

> To allow someone else to perform my duties while I remain legally responsible for their actions under both State and Federal law jeopardizes both the integrity of Federal funding for the Mississippi National Guard and my position as Adjutant General.
>
> I am revoking any prior delegations of authority made by me, and I will perform the duties and obligations imposed upon me by State and Federal law. Not to reassert my authority as Adjutant General would be in dereliction of these duties.

On April 19 the general attempted to return to his former office but was ordered to vacate same by Lieutenant Governor Brad Dye, acting in the stead of the absent governor. When the general refused he was removed by officers of the state highway patrol acting on orders of Governor Dye.

The general brought the instant action in the Southern District of Mississippi seeking a judgment declaring that until properly removed he possessed the federal and state authority to oversee the day-to-day operations of the Mississippi National Guard. He further sought a preliminary and permanent injunction restraining the governor from impeding his performance of duties. Both

parties agreed that there were no material issues of fact and each sought summary judgment.

Shortly thereafter, charges were brought against the general in a pretrial general court-martial proceeding held pursuant to the Mississippi Code of Military Justice, Miss.Code Ann § 33-13-1 *et seq.* The general was formally suspended with pay from his position as adjutant general. Following the formal investigation the governor ordered that a court-martial be convened.[4] The general moved the district court to enjoin the court-martial proceedings; the court denied that motion.

After the district court declined to intervene, the military judge dismissed the charges against the general, essentially finding that the governor had exerted undue command influence in that the court martial appeared to be in retaliation for the filing of the instant complaint. That ruling was on appeal to the Mississippi Court of Military Appeals when the case at bar was submitted on appeal to the court.[5]

---

[4] Miss.Code Ann. § 33-13-175 confers upon the governor the authority to convene a general court-martial. A formal investigation must be completed before court-martial charges may be preferred.

[5] General Farmer contends that the dismissal is non-appealable, based on Rule 6 of Practice and Procedure of the Mississippi Court of Military Appeals ("The accused shall be the appellant in all cases."). The only evidence of these rules in the record indicates their promulgation pursuant to Miss.Code Ann. § 33-13-417(1)(b) on November 1, 1990, the same day, apparently, as the military judge's dismissal of the charges. We do not reach that issue in today's disposition.

In issuing its memorandum opinion on summary judgment the district court considered several issues, including justiciability, standing, availability of due process claims, the degree of deference due the National Guard Bureau's approval of the governor's actions, and the extent to which an adjutant general is granted federal powers. The district court reached the merits of the dispute and resolved same by rendering a declaratory judgment and ordering injunctive relief in favor of General Farmer. 757 F.Supp. 1462. The Governor timely appealed. The district court denied the governor's request for a stay of its judgment; a panel of this court granted that stay pending the governor's appeal. The matter was presented on briefs and oral argument and submitted for decision.

Analysis

The foregoing factual scenario might appear to be more at home in the plot of a class B movie about a fictional *coup d'etat* in a third world country than to present-day happenings in a sovereign state, but the jurisprudential issues raised are of constitutional proportions. We are keenly aware that judicial intrusion into military matters is to be most cautiously and charily approached. This perception is the product of the profound realization that the judicial process is manifestly ill-suited for resolution of most of the myriad disputes which arise in that field. *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407, 415 (1973) ("It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible – as the Judicial branch is not – to the electoral

process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence.").[6]

Whereas the present appeal poses, *inter alia*, inquiries into whether: (1) the general has standing; (2) the eleventh amendment bars the result reached by the trial court; and (3) a suspension with pay constitutes a constitutional deprivation of a property right, we need reach and decide only the threshold inquiry of justiciability. If the dispute presented is not justiciable in a federal court we may proceed no further.

Our relatively recent holding on the justiciability of National Guard-related disputes, *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986), largely guides today's decision. In *Crawford* we rejected the compensatory and equitable claims of 12 national guardsmen who contended that they had been dismissed or placed in the inactive (and unpaid) reserve in retaliation for reporting criminal and discriminatory activity within the Texas Army National Guard. Review of the Supreme Court's rejection of *Bivens*-type[7] action by military personnel in *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), and of its reaffirmation of the *feres*[8] doctrine in

---

[6] Experience teaches that the converse is equally true. *Cf. Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866)

[7] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

[8] *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

United States v. Shearer, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985), led the *Crawford* court to the conclusion that the guardsmen's suit for money damages was barred.

> The principle expressed in these cases is that civilian courts may not sit in plenary review over intraservice military disputes. Following *Chappell* and *Shearer*, there can be little doubt that the permissible range of lawsuits by present or former servicemen against their superior officers is, at the very least, narrowly circumscribed.

Crawford, 794 F.2d at 1035 (footnote omitted). We categorically rejected section 1983 compensatory relief for national guardsmen in view of the exclusive remedies which the services offer for redress of grievances.

The claim for injunctive relief in the nature of reinstatement in the Texas National Guard was also denied. The *Crawford* court examined various military-related cases[9] and concluded:

---

[9] *Chappell; Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) (Jewish officer's free exercise-based challenge to Air Force regulation prohibiting wearing headgear indoors rejected); *Brown v. Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (reaching merits of and rejecting attack against Air Force regulation requiring prior approval for soliciting petition signatures); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (overturning sex-based discriminatory administration of quarters allowances for servicemembers' dependents); *Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985) (upholding injunction against free speech-abridging off-limits regulation).

> The common characteristic of these decisions is that they involve challenges to the facial validity of military regulations and were not tied to discrete personnel matters. The nature of the lawsuits, rather than the relief sought, rendered them justiciable. . . . We therefore believe that suits for injunctive relief, like those for monetary damages, must be careful regulated in order to prevent intrusion of the courts into the military structure.

794 F.2d at 1036-37. General Farmer asks us to uphold just such an intrusion. His suit is little more than a direct attack on a personal order of the Mississippi National Guard commander-in-chief. While the courts occasionally have been willing to examine the lawfulness of induction or discharge, *Geyen v. Marsh*, 775 F.2d 1303 (5th Cir.1985), decisions internal to the chain of command require much greater deference, lest we soon find ourselves mired in the nigh-impossible task of judicially reviewing each order or directive issued by lawful military authority. As Justice Jackson incisively opined in the frequently quoted passage in *Orloff v. Willoughby*, 345 U.S. 83, 93-94, 73 S.Ct. 534, 539, 97 L.Ed. 842, 849 (1953):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a

> separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

The keen effort by the general's able counsel to recast this dispute as an internecine political struggle in Mississippi, rather than a military personnel matter, adds little force to his invocation of the protection of the federal civil courts. While we have concluded that the dispute essentially presents a military question, the state law issues of the discharge of the adjutant general and the propriety of the court-martial charges and ruling thereon are not fit grist for the federal section 1983 mill.

We therefore hold that the district court erred in concluding that this matter was justiciable in a federal forum and that it improvidently reached the merits and entered an injunction. Accordingly, we VACATE the judgment of the district court and DISMISS the complaint. The matter is REMANDED for entry of an appropriate judgment consistent herewith.

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

September 11, 1991

Mr. J.T. Noblin, Clerk
U.S. District Court
245 E. Capitol St., Rm. 416
Jackson, MS 39201

No. 91-1274 – Farmer vs. Mabus
(D.C. No. CA-J90-0206 (B))

[X] Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

[ ] Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

[ ] The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

[ ] Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

[ ] We have received a certified copy of an order of the Supreme Court denying certiorari in the above

cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following addidional documents:

[X] Copy of the Court's opinion.

[X] Original record on appeal or reviews. 4 Volumes

[X] Other original papers forwarded with record. 1 Envelope___ Box

[ ] Bill of Costs approved by this Court. [ ] Copy enclosed to counsel.

cc: (Letter Only)

Judge William H. Barbour, Jr.
Mr. Stephen J. Kirchmayr, Jr.
Ms. Shirley Payne

Sincerely,

GILBERT F. GANUCHEU, Clerk

By: /s/ Nancy Falsacher
Deputy Clerk

APPENDIX

Adjutant General's Duties set by National Guard Regulations (NGRs)

1. Federal Recognition of Army National Guard Units (NGR 10-1)
2. STARC Headquarters Responsibilities (NGR 10-2)
3. Army national Guard Energy Program (NGR 11-27)
4. Administration/Operation of Administrative Use Vehicles (NGR 58-1)
5. Aviation (MARNG Supplement 1 to NGR 95-1)
6. Appointment of Untied States Property and Fiscal Officers (NGR 130-6)
7. Physical Security – Arms, Ammunition and Explosives (NGR 190-11)
8. Unit Funds (NGR 230-65)
9. Orders – Issuing, Policies, Etc. (NGR 310-10)
10. Control of Reports (NGR 335-10)
11. NCO Education System (NGR 351-3)
12. Authorization for MS Military Academy (NGR 351-5)
13. Accident Prevention (NGR 385-5)
14. Safety and Health (NGR 385-10)
15. Radiation Safety (NGR 385-11)
16. Premobilization Screening of ARNG Personnel (NGR 600-2)

17. Active Guard/Reserve (AGR Program (NGR 600-5)
18. Selection, Training and Assignment of FTRF (NGR 600-6)
19. Managing Active Army Personnel (NGR 600-7)
20. Army National Guard Family Program (NGR 600-12)
21. Human Relations (MSARNG Pam 600-21)
22. Appointment and Supervision of Officer/ Warrant Officer Careers in the Army National Guard (MARNGR 600-100)
23. Attachment of Warrant Officers (NGR 600-101)
24. Management of Enlisted Soldiers (NGR 600-200)
25. Recruiting and Retention (NGR 601-1)
26. Army National Guard Attrition Management Program (NGR 601-280)
27. OER – Rater of the Senior Army Advisor (NGR 614-3)
28. Federal Recognition Withdrawals (NGR 635-101)
29. Twenty (20) Year Retention Board Officer and Warrant Officers) (NGR 635-102)
30. Retirement Board Processing (NGR 640-1)
31. 201 Files (Military Personnel Records) (NGR 640-100)
32. Superior Unit Awards (NGR 672-1)

a. Eisenhower Trophy

b. Pershing Trophy

c. The National Guard Association Trophy

d. NGB Award for Efficiency in Maintenance

e. Association of the United States Army Award

f. The ARNG Safety Award for Honor and the ARNG Safety Award and the ARNG Safety Award of merit

g. ARNG Distinguished Safety Awards (Aviation and Motor Vehicle)

h. The General Douglas MacArthur Leadership Award

33. EEO, Processing of Complaints (NGR 690-600)

34. Loan and Use of Property (NGR 735-12)

35. Maintenance Operations (NGR 750-1)

36. MATES Operations (NGR 750-2

37. Command Maintenance Evaluation Team (COMET) (NGR 750-51)

38. Environmental Protection and Enhancement (AR 200-1)

39. Military Construction Army National Guard Program Development (NGR 415-5)

§ 33-3-11. General powers and duties of adjutant general.

The adjutant general shall:

(1) Appoint all of the employees of his department and he may remove any of them at his discretion;

(2) Keep rosters of all active, reserve and retired members of the militia of this state, and keep in his office all records and papers required to be kept and filed therein;

(3) Submit to the governor in each year preceding a regular session of the legislature a printed detailed report of the transactions of his office, the expenses thereof, and such operations and conditions of the national guard of this state as may be required by the governor;

(4) Cause the military law, the regulations of the national guard of this state and such other military publications as may be necessary for the military service to be distributed at the expense of the state to commands so that all personnel of the national guard of this state will have access to same;

(5) Keep records on and preserve all military property belonging to the state;

(6) Keep just and true accounts of all moneys received and disbursed by him;

(7) Attest all commissions and warrants issued to military officers of this state;

(8) Have a seal;

(9) Make such regulations pertaining to the preparations of reports and returns and to the care and preservation of property in possession of the state for military purposes, whether belonging to the state or the United States, as in his opinion the conditions demand;

(10) Attend the care, preservation, safekeeping, transportation and repairing of the arms, ordnance [sic], accouterments, equipment and all other military property belonging to the state or issued to the state by the government of the United States for military purposes, and keep accurate accounts thereof;

(11) issue such military property as the necessity of the services require and make purchases for that purpose. No military property shall be issued or loaned, except upon an emergency, to persons or organizations other than those belonging to the National Guard of Mississippi except to such portions of the unorganized militia as may be called out by the governor;

(12) Keep the reports and returns of troops and all other writings and documents required to be preserved by the state military headquarters;

(13) Keep necessary records attesting to the service of individuals of Mississippi forces for the Spanish American War and all subsequent wars and insurrections. The adjutant

general is authorized to make a determination as to when old records have only historical value, and therefore, transfer them to the state department of archives and history for reference and preservation;

(14) Those records and relics not required for efficient operation of the military department may be turned over to the department of archives and history for preservation.

(15) The adjutant general with the approval of the governor shall provide for and be responsible for the organization, training, tactical employment, and discipline of the Mississippi National Guard, Mississippi State Guard, and the unorganized militia when called to active state duty.

SOURCES: Codes, 1942, § 8519-16; Laws, 1966, ch. 539, § 7, eff from and after June 1, 1966.

(2)

NO. 91-813

Supreme Court, U.S.
FILED
DEC 18 1991
OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1991

ARTHUR J. FARMER,
PETITIONER

VERSUS

RAY MABUS,
GOVERNOR OF THE STATE OF MISSISSIPPI,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

STEPHEN J. KIRCHMAYR
DEPUTY ATTORNEY GENERAL
COUNSEL OF RECORD

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE (601) 359-3680

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. DOES THIS COURT LACK JURISDICTION OVER THIS MATTER BECAUSE: (A) ON JANUARY 14, 1992, THIS MATTER WILL BE MOOT, OR (B) THE PETITIONER DOES NOT HAVE STANDING?

2. UNDER THE SPECIFIC FACTS OF THIS CASE, WAS THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECT IN CONCLUDING THAT DISCIPLENARY ORDERS GIVEN BY THE GOVERNOR OF MISSISSIPPI, AS COMMANDER-IN-CHIEF OF THE MISSISSIPPI MILITIA, TO HIS SUBORDINATE, THE ADJUTANT GENERAL, WERE NON-JUSTICIABLE?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table Of Contents	ii
Table of authorities	iii
Opinion Below	1
Statement Of The Case	1
Argument	4
I. The appeal will be moot on January 14, 1992, because petitioner's position ceases with the expiration of Governor Mabus' term of office	4
II. The petitioner does not have standing to challenge the governor's actions concerning federal law	6
III. The fifth circuit's decision on non-justiciability, when applied to petitioner, does not conflict with decisions of this court and other circuits	10
IV. The adjutant general is subordinate to the governor in matters affecting the military department and militia of the state of mississippi	15
Conclusion	19

TABLE OF AUTHORITIES

Cases:	*Page*
Allen v. Wright, 468 U.S. 737 (1984)	9, 10
Ballenger v. March, 708 F.2d 349 (8th Cir. 1993)	6
Bishop v. Wood, 426 U.S. 341 (1976)	17
Board of Regents v. Roth, 408 U.S. 564 (1922)	17
Chappell v. Wallace, 462 U.S. 296 (1983)	6, 11, 12, 13, 14
City of Los Angeles v. Lyons, 461 U.S. 95 (1983)	10
Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975)	13
Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986)	10, 12
Feres v. United States, 340 U.S. 135 (1950)	11, 12, 13
Golden v. Zwickler, 394 U.S. 103 (1969)	5
Johnson v. Powell, 414 F.2d 1060 (5th Cir. 1969)	7
Liner v. Jafco, Inc., 375 U.S. 301 (1964)	5
Lovell v. Heng, 890 F.2d 36 (1989)	14

	PAGE
Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971)	14
Orloff v. Willoughby, 345 U.S. 84 (1953)	10
Parker v. Levy, 417 U.S. 733 (1974)	15
Perpich v. Department of Defense, ___U.S.___, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990)	8, 13 , 14
Shaw v. Gavatney, 795 F.2d 1351 (8th Cir. 1986) ...	14
United States v. Munsingwear Corp., 340 U.S. 36 (1950)	6
United States v. Shearer, 473 U.S. 52 (1985)	11
United States v. Stanley, 483 U.S. 669 (1987)	12
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)	6
Warth v. Seldin, 422 U.S. 490 (1975)	10
Watson v. Arkansas National Guard, 886 F.2d 1004 (8th Cir. 1989).....	14
Weinstein v. Bradford, 423 U.S. 147 (1975)	5
OTHER AUTHORITIES:	
Mississippi Constitution, Article 3, Section 9	15

	PAGE
Mississippi Constitution, Article 9, Section 217	15
Mississippi Constitution, Article 9, Section 219	16
Section 25-9-107, Mississippi Code Annotated	17
Section 25-9-127, Mississippi Code Annotated	17
Section 33-3-1, Mississippi Code Annotated	16
Section 33-3-3, Mississippi Code Annotated	15, 16
Section 33-3-7, Mississippi Code Annotated	16, 17
10 U.S.C. Section 3351	7
10 U.S.C. Section 3363	9
32 U.S.C. Section 104	7
32 U.S.C. Section 108	9
32 U.S.C. Section 314(a)	8
42 U.S.C. Section 324(b)	9
42 U.S.C. 1983	12
National Guard Regulation 600-100 Paragraph 11-3	9

No. 91-813

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ARTHUR J. FARMER,

PETITIONER,

versus

RAY MABUS,
GOVERNOR OF THE STATE OF MISSISSIPPI,

RESPONDENT

The respondent Ray Mabus, Governor of the State of Mississippi, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's decision in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Farmer v. Mabus*, 940 F.2d 921 (5th Cir. 1991).

STATEMENT OF THE CASE

When the respondent, Governor Ray Mabus, appointed the petitioner to the position of Adjutant General in 1988, he assured the petitioner that he would be allowed to command the Mississippi National Guard in accordance with the law. There is absolutely no proof in this case that respondent, for political reasons, directed petitioner to make appointments to fill officer slots in the Mississippi National Guard. The Fifth Circuit recognized "[t]he keen effort by the general's able counsel to recast this dispute as an internecine political struggle in

Mississippi, rather than a military personnel matter," and rejected that characterization of this dispute. Pet. 65A.[1]

In January of 1990, Governor Ray Mabus learned from a news article that the petitioner, Adjutant General Arthur J. Farmer, had purchased real property adjacent to Camp Shelby, Mississippi, at a time when possible expansion of Camp Shelby was under consideration. Pet. 2A. On January 24, 1990, respondent Mabus issued a written reprimand to General Farmer concerning his purchase of property adjacent to Camp Shelby and formally asked petitioner "to immediately divest" himself of any interest in the property. Pet. 2B. The Governor additionally informed the Adjutant General that he had requested the Mississippi Ethics Commission to thoroughly investigate this matter. Pet. 2B.

On February 9, 1990, respondent Mabus informed, directed, and ordered Adjutant General Arthur J. Farmer as follows:

(1) That as Commander-in-Chief of the Military Department of the State of Mississippi, respondent Mabus was assuming direct control over the day-to-day operations of the Department;

(2) Respondent Mabus appointed Brigadier General Brackeen to assume an added duty as the Governor's Special Advisor for Military Affairs wherein General Brackeen would be responsible for advising the Governor with respect to all aspects of the functioning of the Military Department of the State of Mississippi. Pet. 3A.

(3) Adjutant General Arthur J. Farmer was directed:

> (a) to coordinate all aspects of his current duties as Adjutant General through respondent Mabus' office, including but not limited to those responsibilities set out in § 33-3-11, Miss. Code of 1972;

---

[1] Pet. ____ refers to the Petitioners' Petition for Writ of Certiorari and the appropriate page.

> (b) to submit a report to the Governor's Office each Thursday afternoon setting out the Adjutant General's proposed activities for the following week;
>
> (c) not to undertake any proposed activities until approved in writing by the Governor; and,
>
> (d) to submit a report each Monday morning to the Office of the Governor, accounting for the Adjutant General's activities for the previous week. Pet. 3A, 4A.

This order in no manner deprived the Adjutant General of any of his authority or responsibilities, nor in any way materially diminished his authority or responsibilities. The February 9, 1990 order clearly contemplated that the Adjutant General would continue with his responsibilities:

> "... including but not limited to those responsibilities of the Adjutant General set out in Section 33-3-11, Mississippi Code of 1972." Pet. 3A.

On February 12, 1990, Lieutenant General John B. Conaway, the Chief of the National Guard Bureau, an auxiliary of the Department of Army and Air Force that is directed to oversee complaince with federal National Guard requirements, issued a memorandum concerning the Mississippi National Guard wherein he stated, *inter alia*:

> Enclosed is a letter from Governor Ray Mabus of Mississippi indicating that he intends to assume direct operational control over the Military Department of the State of Mississippi, and that his advisor and representative in that regard will be Brigadier General Denver Brackeen. This has been accomplished.
>
> Governor Mabus has asked that the National Guard Bureau work directly with his office on National Guard matters. *This action is within the authority of the Governor, as Commander-in-Chief of the Mississippi National Guard*. (emphasis added) Pet. 4D.

The Adjutant General refused to recognize the superior civilian authority of the Governor and on April 18, 1990, attempted to reassert his authority to command the day-to-day activities of the Mississippi National Guard. Pet. 5A, 6A. In the absence of the Governor, the Lieutenant Governor directed the Adjutant General to conform his conduct to the prior orders of the Governor, which the Adjutant General reluctantly did. Pet. 5A, 6A. The Adjutant General continued to reject the notion of civilian control and initiated this action in district court.

Predicated upon the foregoing, the Governor became convinced that the Adjutant General would never submit to civilian control. This insubordination coupled with the perceived various violations of the Mississippi Code of Military Justice compelled the Governor to initiate court martial proceedings against the Adjutant General. On June 15, 1990, the Governor suspended the Adjutant General, with pay, until the final resolution of the court martial proceedings. Pet. 8A, 9A. The court martial proceeding was resolved in favor of the petitioner; his suspension was lifted; and, he presently functions in his position subject to the February 9, 1990 orders of the Governor.

ARGUMENT

I. THE APPEAL WILL BE MOOT ON JANUARY 14, 1992, BECAUSE PETITIONER'S POSITION CEASES WITH THE EXPIRATION OF GOVERNOR MABUS' TERM OF OFFICE

Respondents' term of office as Governor of the State of Mississippi ceases on January 14, 1992.[2] Pursuant to Article 6, Section 219 of the Mississippi Constitution, "[t]he Adjutant General['s] . . . appointment shall expire with the governor's term of office." Pet. 6. This issue will be moot on January 14, 1992, *i.e.*, petitioner will no longer be Adjutant General and respondent will no longer be governor.

---

[2] In the November 1991 general election, Governor Ray Mabus, seeking a second term as a Democrat, was defeated by Kirk Fordice, a Republican.

This dispute is not "capable of repetition, yet evading review." In *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), this Court elaborated on this doctrine, and held that a case was not moot when: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation and expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again." In this regard, on December 11, 1991, Governor-elect Fordice publicly announced that he would appoint Jim Garner of Biloxi, Mississippi as Adjutant General of the Mississippi National Guard. Clearly, petitioner will not be reappointed to the position of Adjutant General, and there is no reasonable expectation that the petitioner will ever be again subject to the same action he now challenges. Simply stated, this issue is moot. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *Golden v. Zwickler*, 394 U.S. 103, 107 (1969).

The record in the action indicates that petitioner at all times has received the maximum and full statutory salary for the position of Adjutant General, however, petitioner now asserts that the Governor has not "issued his statutorily required recommendation that General Farmer be promoted to Major General." Pet. 12. This is a non-issue because when the petitioner was confirmed by the Mississippi Senate, state law automatically commissioned petitioner as a Major General in the Mississippi National Guard. Section 33-3-7, Miss. Code Ann. provides, in part:

> "The governor shall nominate and, by and with the consent of the senate, appoint and commission an Adjutant General, which appointment shall carry with it the rank of Major General."

Petitioner evidently is incorrectly complaining that he has not been promoted to a Major General in the United States National Guard. Pet. 9. There is absolutely no requirement that a state Adjutant General have a federal commission. In order to have a federal rank of Major General in the United States National Guard, a guardsman must be federally recognized. Federal recognition means acknowledgement by the federal government that a person appointed by the state to the National Guard meets the prescribed federal standards for their particular rank. The Adjutant Generals of various states, unlike any

other member or officer of the National Guard, are not required to have federal recognition. Accordingly, there is no state or federal statutory requirement that petitioner have a federally recognized rank of Major General. The uniqueness of state Adjutant Generals will be fully discussed in the next section of this brief.

Further, petitioner has not requested the Board for Correction of Military Records, 10 U.S.C. 1552, to review this supposed promotion issue. This board was especially created by Congress to resolve disputes of this nature, and as this Court recognized in *Chappell v. Wallace*, 462 U.S. 296, 303 (1983), petitioner must avail himself of this administrative process before seeking federal judicial review. *Also see*, *Ballenger v. March*, 708 F.2d 349, 350-51 (8th Cir. 1983).

This appeal is moot and because the Fifth Circuit directed the district court to vacate its judgment and dismiss petitioner's complaint, Pet. 65A, this Court should simply deny the Petition for Certiorari. *United States v. Munsingwear Corp.*, 340 U.S. 36 (1950).

II. THE PETITIONER DOES NOT HAVE STANDING TO CHALLENGE THE GOVERNOR'S ACTIONS CONCERNING FEDERAL LAW

The basic rules that have developed regarding standing are: (1) the plaintiff must clearly allege and demonstrate that he personally has suffered or will suffer some distinct and individualized injury-in-fact as a result of defendant's putatively illegal conduct; (2) the injury can be traced with some degree of causal certainty to the challenged conduct of defendant; (3) the personal injury is likely to be redressed by the requested relief; (4) the plaintiff must assert his own legal rights and interests and not those of third parties; (5) the injury must consist of more than a generalized grievance that is persuasively shared by many; and (6) the plaintiff's complaint must fall within the zone of interests to be regulated or protected by the provision in question. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-477 (1982). With these elements in mind, a review of the structure of the National Guard and the role of a state Adjutant General demonstrate that

the petitioner has no standing to challenge the Governor's action concerning federal law or federal regulations as they relate to the Mississippi National Guard or as they relate to the Adjutant General.

The National Guard of the United States, as we know it today, was established by Congress in 1933 as a reserve component of the U.S. Army and U.S. Air Force. 48 Stat. 155. The National Guard of the United States consists of the federally recognized members of the National Guard of the various states. Id. The 1933 Act created a dual enlistment system whereby "an incoming guardsman joined both the National Guard of his home state and the National Guard of the United States." *Johnson v. Powell*, 414 F.2d 1060, 1063 (5th Cir. 1969).

The state entities known as "National Guard" are defined by 32 U.S.C. § 101(4) as follows:

> National Guard means that part of the organized militia of the several states . . ., active and inactive that --
>
> (a) is a land force;
>
> (b) is trained, and has its officers appointed, under the Sixteenth Clause of Section 8, Article I, of the Constitution;
>
> (c) is organized, armed, and equipped wholly or partly at Federal expense; and
>
> (d) is *federally recognized*. (emphasis supplied)

"Federal Recognition" means acknowledgement by the federal government that persons appointed by the state to the Guard meet the prescribed federal standards for their particular service grade. Members of the Mississippi National Guard, as a consequence of federal recognition, concurrently hold membership in a distinct federal military organization, the National Guard of the United States. 10 U.S.C. § 3351(a).

While there exists a dual enlistment system, there does not exist a *dual service system*. A member of the National Guard can only wear one hat at a time, *i.e.* -- he either is serving the state as a member of the Mississippi National Guard or he is serving

the nation as a member of the United States National Guard. A member of the National Guard cannot simultaneously serve the state and the national government.

This Court in *Perpich v. Department of Defense*, ___ U.S. ___, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990) clearly articulated this "one hat" at a time concept:

> Since 1933 all persons who have enlisted in a state National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they become a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate state guard unit.
>
> * * *
>
> In a sense, all of them now must keep three hats in their closets--a civilian hat, a state militia hat, and an army hat--only one of which is worn at any particular time. When the state militia hat is being worn, the 'drilling and other exercises' . . . are performed pursuant to 'the authority of training the Militia according to the disciplines prescribed by Congress', but when the hat is replaced by the federal hat, the militia clause is no longer applicable.

In this regard, if a member of the Mississippi National Guard is federalized or called to active duty, such member is relieved of his Mississippi National Guard duties until he is released from his national active duty status.[3]

Congress has also required that there shall be an Adjutant General in each state and that such Adjutant General "*shall perform the duties prescribed by the laws of that jurisdiction.*" 32 U.S.C. § 314(a). In this instance, Congress, clearly deferred to the states the ability to determine what specific duties would be required of a state Adjutant General, as well as how those duties could be effectuated.

---

[3] This statement is made explicitly clear by 32 U.S.C. § 325(a) and 32 U.S.C. § 102(12). Petitioner was not called to active duty during the period in question.

To further illustrate the congressional intent that a state Adjutant General shall perform "the duties prescribed by the laws of" a state, federal law prohibits the federal government from taking any punitive action against a state Adjutant General.

The Adjutant General in his present status as a member of the Mississippi National Guard cannot be court martialed under the United States Uniform Code of Military Justice, and can only be discharged "as provided by the laws of the State" of Mississippi. *See* 42 U.S.C. § 324(b). In the event that the Adjutant General would violate any federal statute or federal rule or regulation concerning the operation of the Mississippi National Guard, the only action the federal government could take would be to bar, wholly or in part, the Mississippi National Guard from receiving federal funds and benefits. *See* 32 U.S.C. § 108.

Further, indicating congressional deference to the various states, the Adjutant General, unlike any other member or officer of the National Guard, *is not required to have federal recognition*. *See*: 10 U.S.C. § 3363. Also, National Guard Regulation 600-100 paragraph 11-3 provides:

> "Federal Recognition Criteria for
> Chief of State Military Departments.
>
> a. State Adjutant General.
>
> (1) A state Adjutant General may be appointed and serve in that capacity without federal recognition."

The "dual enlistment system" under which guard members and officers enlist and serve in both a state and federal guard is not mandatory on the various state Adjutant Generals, and, equally as clear, Congress has deferred to the various states the prerogative of determining the duties of a state Adjutant General.

As this Court has reiterated, standing is perhaps the most important of the jurisdictional doctrines. *Allen v. Wright*, 468 U.S. 737, 750-751, (1984). Federal courts are confined to

the adjudication of actual "cases" and "controversies" within the meaning of Article III of the Constitution, and those doctrines set forth "fundamental limits on federal judicial power in our system of government." *Allen*, 468 U.S. at 750. The requirements of standing--premised upon the "properly limited . . . role of the courts in a democratic society"--is thus a threshold determination, and it may not be glossed over. *Id., quoting Warth v. Seldin*, 422 U.S. 490, 498, 45 L.Ed.2d 343 (1975).

Moreover, where the relief sought is injunctive in nature, rather than simply damages for past conduct, to have standing the petitioner further must clearly allege and demonstrate, *inter alia*, that he *personally* faces a realistic, immediate, and non-speculative threat that he will be subjected to, and harmed by, the particular policy of which he complains. *City of Los Angeles v. Lyons*, 461 U.S. 95, 75 L.Ed.2d 675 (1983). In this action, the petitioner has totally failed to prove such a threat or injury.

The Adjutant General has no standing to challenge the Governor's action concerning federal law or regulations as they relate to the Mississippi National Guard or as they relate to the Adjutant General.

III. THE FIFTH CIRCUIT'S DECISION OF NON-JUSTICIABILITY WHEN APPLIED TO PETITIONER, DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

This case challenges a military personnel action, i.e., the orders of the Governor, as commander-in-chief, to his Adjutant General. The Fifth Circuit relied largely on its prior decision of *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986) and correctly concluded that this action was not "justiciable in a federal forum." Pet 65A.

This Court in *Orloff v. Willoughby*, 345 U.S. 84, 93-94 (1953) stated:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justifica-

> tion, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service."

In *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) this Court stated:

> "The special relationships that define military life have 'supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that Courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."

The *Chappell* court determined that military personnel may not bring a *Bivens* type[4] damage suits for constitutional violations against their superior officer. The *Chappell* court followed the doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950) which doctrine precludes claims under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." Id. at 146.

This Court in *United States v. Shearer*, 473 U.S. 52 (1985) reaffirmed the effectiveness of the *Feres* court:

> "To permit this type of suit [negligence] would mean that commanding officers would have to stand pre-

---

[4] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

> pared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to replace restraints on a soldier's off-base conduct." *Id.* at 58.

Finally, in *United States v. Stanley*, 483 U.S. 669 (1987), this Court observed that the various circuits had not been uniform in their interpretation of *Chappell*. *Id.* at 676. This Court reaffirmed *Feres*, *supra*, concluding that the "incident to service" test established in *Feres* was to be applied to *all Bivens*' claims in a military setting. *Id.* at 680.

Chappell and *Stanley* were suits against federal defendants, thus involved a *Bivens*' claim, while this civil action is brought against the Governor, as Commander-in-Chief of the Mississippi National Guard, under 42 U.S.C. 1983.

The Fifth Circuit in *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986), affirmed the district court's dismissal of claims brought by members of the Texas National Guard against the Guard, the Governor, and twelve military personnel for violation of their constitutional rights. The *Crawford* plaintiffs asserted that they were dismissed or removed from active duty in retaliation for reporting criminal activity and racial discrimination. The *Crawford* court found no significant difference between the claims in that action and those held impermissible in *Chappell*. The Fifth Circuit found that the First, Fifth, and Fourteenth *(due process)* Amendments and § 1983 causes of action advanced in *Crawford* required "judicial second-guessing of military actions" and interfered with the military system to the same extent as the *Bivens*' claims rejected in *Chappell*.

The *Crawford* court stated:

> "The principle expressed in these cases *[Chappell* and *Shearer]* is that civilian courts may not set in plenary review over intraservice military disputes. Following *Chappell* and *Shearer*, there can be little doubt that *the permissible range of lawsuits by present or former servicemen against their superior officers is, at the very least,*

> *narrowly circumscribed*." *Id.* at 1035 (emphasis supplied).
>
> * * *
>
> [W]e perceive no basis upon which to distinguish such claims [§1983] from those held impermissible by *Chappell*. *Id.* at 1036.

Further, *Crawford* declined to except plaintiff's claims for injunctive relief from the principles announced by *Chappell*, finding that such an exception:

> "could swallow *Chappell's* rule of deference. We therefore believe that suits for injunctive relief, like those for money damages, must be carefully regulated in order to prevent intrusion of the courts into the military structure." 794 F.2d at 1036-37.

In footnote 1 on page 13 of his petition, petitioner lists cases which he asserts are contrary to the "non-justiciability decision" rendered by the Fifth Circuit. Petitioner's assertion is incorrect. All of these cases except *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975) were specifically considered by the Fifth Circuit in *Crawford*, and that court correctly concluded:

> The Common characteristic of these decisions is that they involve challenges to the facial validity of military regulations and were not tied to discrete personnel matters. The nature of the lawsuits, rather than the relief sought, rendered them justiciable. . . . We therefore believe that suits for injunctive relief, like those for monetary damages, must be careful regulated in order to prevent intrusion of the courts into the military structure. 794 F.2d at 1036-37.

Committee for G. I. Rights v. Callaway, *supra*, also involved challenges to the facial validity of military regulations, *i.e.*, a drug abuse prevention plan, and were not tied to "discrete personnel matters." Petitioner also incorrectly asserts that the Fifth Circuit's "non-justiciability decision" is "counter to this Court's recent opinion in *Perpich v. Depart-*

ment of Defense, ___ U.S. ___, 110 L.Ed 2d 312 (1990). Pet. 13. *Perpich* did not involve a discrete personnel matter, but concerned itself with litigation initiated by the Governor of Minnesota challenging the constitutionality of a federal statute.

The Eighth Circuit in *Watson v. Arkansas National Guard*, 886 F.2d 1004 (8th Cir. 1989) and *Lovell v. Heng*, 890 F.2d 36 (1989), concurred with the *Crawford* court finding that a National Guard member was precluded from seeking injunctive relief concerning a military personnel decision. It should be noted that prior to the *Watson* and *Lovell* decisions, the Eighth Circuit decided *Shaw v. Gavatney*, 795 F.2d 1351 (8th Cir. 1986), wherein the Court held that Shaw's dismissal as United States property and fiscal officer for the State of Arkansas was subject to judicial review, pursuant to the factors set out in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). In *Watson*, the Eighth Circuit addressed its prior *Shaw* decision and stated:

> "The Army, however, only challenged the district court's conclusion that the balancing of the *Mindes* factors weighed heavily in favor of judicial review. Id. Our Court was asked only to review the district court's weighing of the *Mindes* factors; we did not discuss the *Feres* or *Chappell* decisions, and the case was pre-*Stanley*. *Shaw* therefore is of little assistance here. The present case is the first case in which we have reached and decided the question whether there is an injunctive-relief exception to *Chappell*." 886 F.2d at 1011.

In this action, the nature of the lawsuit clearly challenges a military personnel action, *i.e.* the orders of the Governor, as Commander-in-Chief, to the Adjutant General. Clearly, the challenge to the validity of the Governor's actions is *TIED* to a military personnel decision.

The respondent submits that there is nothing in this record that supports or suggests that the Governor's actions were "political", Pet. 65A, or that those actions generated from any thing but (1) the illegitimate land transaction, and (2) the insubordination of the Adjutant General.

The decision of the Fifth Circuit is correct and is not at cross-purpose with the decisions of this Court or other circuits. The issues presented are not substantial and are definitely not of national concern.

IV. THE ADJUTANT GENERAL IS SUBORDINATE TO THE GOVERNOR IN MATTERS AFFECTING THE MILITARY DEPARTMENT AND MILITIA OF THE STATE OF MISSISSIPPI

This Court *Parker v. Levy*, 417 U.S. 733, (1974) recognized that the military is subject to direct civilian control of the Commander-in-Chief:

> "As we observed...the military 'is the *executive arm' whose 'law is that of obedience.*' While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. *The military establishment is subject to the control of the civilian commander in chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.*" (emphasis supplied)

The orders given by the Governor to the Adjutant General were authorized by state law and were in conformity with the teachings in *Parker v. Levy, supra*. In that regard, Article 3, Section 9 of the Mississippi Constitution provides:

> "The military shall be in strict subordination to the civil power."

Additionally, Article 9, Section 217 of the Mississippi Constitution provides that:

> "[T]he governor shall be the commander-in-chief of the military..."

Further, § 33-3-3 Miss. Code Ann. provides:

> There shall be in the executive branch of state government a military department. The Adjutant General shall be the executive head of the department and, as such, subordinate . . . *to the governor in matters pertaining thereto.*

Further, § 33-3-1 Miss. Code Ann. provides in part:

> The Governor shall be the Commander-in-Chief of the militia . . . except when it is called into the service of the United States.

Finally, § 33-3-7, Miss. Code Ann. provides in part:

> "The Adjutant General shall be chief of staff to the governor, *subordinate only to the governor in matters affecting the military department and militia of this state.*"

The state statutes concerning the duties of the Adjutant General and their dimensions contemplate that the Adjutant General is merely the executive head of the Mississippi National Guard and in all matters pertaining thereto is subordinate to the Governor.

Petitioner's lack of a property right in the position of Adjutant General further demonstrates that the Adjutant General is completely subordinate to the Governor. In that regard, Article 9, Section 219, Mississippi Constitution provides:

> The adjutant-general, and other staff officers to the commander-in-chief, shall be appointed by the governor, and their appointment shall expire with the governor's term of office, and the legislature shall provide by law a salary for the adjutant-general commensurate with the duties of said office.

Further, Section 33-3-3, Mississippi Code Ann. (1972) provides, in part:

> There shall be in the executive branch of the state government a military department. *The Adjutant General shall be the executive head of the department* and, as

> such, subordinate only to the governor in matters pertaining thereto.

Finally, Section 33-3-7, Mississippi Code Ann. (1972) provides, in part:

> The governor shall nominate and, by and with the consent of the senate, appoint and commission an Adjutant General . . .

The above provisions do not, expressly or implicitly, create any property interest in the position of Adjutant General because they do not contain a substantive "only for cause" limitation on removal of an individual from the position of Adjutant General. *Board of Regents v. Roth*, 408 U.S. 564 (1922); *Bishop v. Wood*, 426 U.S. 341 (1976).

Notwithstanding the above constitutional and statutory provisions, the Mississippi Legislature in 1984 created a Statewide Personnel System which gave "state service" employees a property right in their position and denied "non-state service employees a property right in their positions. The petitioner is explicitly excluded from any property interest under this scheme.

Section 25-9-127, Miss. Code Ann. (Supp. 1990) provides, in part:

> No employee of any department . . . who is included under this chapter . . . may be dismissed or otherwise adversely affected as to compensation or employment status except for inefficiency or other good cause . . .

Section 25-9-107, Miss. Code Ann. (Supp. 1990) defines the state employees contemplated by § 25-9-127, supra, and provides, in part:

> (b) "State service" shall mean all employees of state departments, agencies and institutions as defined herein, except those officers and employees excluded by this chapter.
>
> (c) "Nonstate service" shall mean the following officers and employees excluded from

> the state service by this chapter. The following are excluded from the state service:
>
> * * *
>
> (viii) Officers and enlisted members of the National Guard of the state;
>
> * * *
>
> (xv) The administrative head who is in charge of any state department, agency, institution, board or commission, wherein the statute specifically authorizes the Governor, board, commission or other authority to appoint said administrative head . . .

Clearly as recognized by Lieutenant General John B. Conaway, Chief of the National Guard Bureau, an auxiliary of the Department of Army and Air Force that is directed to oversee compliance with federal national guard requirements, the orders given by the Governor to petitioner were "within the authority of the Governor, as Commander-in-Chief of the Mississippi National Guard." Pet. 4D.

V. CONCLUSION

For the reasons set forth above, respondent respectfully submits that this Court should deny the petition for Certiorari.

This, the 18th day of December, 1991.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

STEPHEN J. KIRCHMAYR
DEPUTY ATTORNEY GENERAL
(Counsel of Record)

COUNSEL FOR RESPONDENT

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE: (601) 359-3680